91-1267

Supreme Court, U.S.
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No. 91-____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

B.J. ALAN COMPANY, INC., OLDE GLORY MARKETING, LIMITED, NEPTUNE FIREWORKS COMPANY, INC. AND CONSIGNED SALES COMPANY, INC.,

Petitioners

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether this Court's decision in *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990) – rendered after the ICC's substantive order in this case – constitutes a "changed circumstance" requiring the ICC to reconsider its order and conform it to *Maislin*.

PARTIES TO THE PROCEEDINGS

The following parties appeared in the proceedings before the Court of Appeals below:

Interstate Commerce Commission
United States of America
B.J. Alan Company, Inc.
Olde Glory Marketing, Limited
Neptune Fireworks Company, Inc.
Consigned Sales Company, Inc.
United Parcel Service, Inc. (an Ohio Corporation)
United Parcel Service, Inc. (a New York Corporation)

Petitioners, B.J. Alan Company, Inc., Olde Glory Marketing, Limited, Neptune Fireworks Company, Inc. and Consigned Sales Company, Inc. are all privately held companies and have no publicly traded parent corporations or subsidiaries.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

B.J. Alan Company, Inc., Olde Glory Marketing, Limited, Neptune Fireworks Company, Inc. and Consigned Sales Company, Inc. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which declined to review and overturn a decision of the Interstate Commerce Commission ("ICC") in its Docket No. MC-C-30093, *B.J. Alan Company, Inc. v. United Parcel Service, Inc.*

OPINIONS BELOW

Neither the opinion of the Court of Appeals (App. A, pp. 1a-5a)[1] nor the decisions of the ICC declining to reopen served June 18, 1990 (*UPS III*, App. C, pp. 18a-25a) and April 12, 1991 (*UPS IV*, App. B, pp. 8a-17a) are reported. The ICC's initial decisions in this matter are reported at *B.J. Alan Company, Inc. v. United Parcel Service, Inc.*, 5 I.C.C.2d 700 (1989)(*UPS II*,

[1] "App." refers to the appendix to this petition.

App. D, pp. 26a-60a), *reversing* 4 I.C.C.2d 704 (1989)(*UPS I*, App. E, pp. 61a-83a), *aff'd sub nom. B.J. Alan Company, Inc. v. ICC*, 897 F.2d 561 (D.C. Cir. 1990).

JURISDICTION

The judgment of the Court of Appeals (App. A, p. 1a) was entered October 4, 1991. Petitioners' petition for rehearing and suggestion for rehearing *en banc* was denied on December 10, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2350(a).

STATUTES INVOLVED

Section 11101(a) of the Interstate Commerce Act, 94 Stat. 1929, as amended, 49 U.S.C. §11101(a), provides, as herein pertinent:

> A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide the transportation or service on reasonable request. In addition, a motor common carrier shall provide safe and adequate service, equipment, and facilities.

Section 10701(a) of the Interstate Commerce Act, 90 Stat. 34, as amended, 49 U.S.C. §10701(a), provides, as herein pertinent:

> A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable.

Section 10101 of the Interstate Commerce Act, 92 Stat.1337, as amended, 49 U.S.C. § 10101, provides, as herein pertinent:

(a) [T]o ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, . . . it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and –

(1) in regulating those modes –

* * *

(B) to promote safe, adequate, economical, and efficient transportation;

* * *

(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination . . .;

* * *

(2) in regulating transportation by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers . . . and consumers;

* * *

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

STATEMENT

1. Petitioners are members of the American fireworks industry who, for many years, relied upon United Parcel Service (UPS) for shipment of their small parcels of common fireworks. Indeed, they organized their mail order "businesses in reliance on the continued availability of UPS' [nationwide small parcel] service" (App. E, p. 67a). In November 1987, UPS filed a tariff with the ICC announcing its intention to refuse to transport common fireworks as defined by the United States Department

of Transportation (DOT).[2] After the tariff became effective on January 1, 1988, UPS refused service to all common fireworks shippers while continuing to hold out service for all other Class C explosives and other hazardous materials as defined by DOT.

In response to a complaint filed by petitioners, the ICC originally held that UPS refused to transport fireworks "on the basis of inconvenience rather than the compelling necessity which the law accepts as adequate justification for different treatment" (App. E., p. 73a). UPS' tariff provisions, therefore, were found to be discriminatory and "unlawful" (*id.*). But, following a change in membership, the agency reversed itself in *UPS II*. While conceding the existence of discrimination in that "one group of shippers is being treated differently from others" (App. D, p. 40a), the ICC's new majority, by a 3-2 vote, declined to decide the case on that basis. Instead, characterizing this as a "refusal-to-serve" case, the new majority applied a novel, relaxed interpretation of the statutory common carrier obligation set forth in 49 U.S.C. §11101(a).

In *UPS II* the ICC openly acknowledged the holding in *Michigan Pub. Util. Comm'n v. Duke*, 266 U.S. 570, 577 (1925) that "a common carrier owes a duty to the public to carry for all to the extent of its capacity at a reasonable charge and with substantial impartiality according to its holding out" (App. D, p. 40a). The ICC also conceded that "[t]his principle was incorporated into the Interstate Commerce Act when it was first enacted, and . . . is the foundation of the requirement now contained in §11101 that common carriers provide service upon reasonable request" (*id.* at 41a). Nonetheless, the agency declined to apply the strict interpretation of §11101(a) mandated in a long line of prior decisions by this Court (*see infra*, pp. 13-17).

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[2] The transportation and manufacture of common fireworks is regulated by DOT and the United States Consumer Product Safety Commission. 49 C.F.R. §§ 173.100(r), 173.108; 16 C.F.R., Parts 1500, 1507. As a Class C explosive, common fireworks are considered a "minimum hazard" (49 C.F.R. § 173.52) and "are suitable for use by the public" (49 C.F.R. § 173.100(r).

Instead, because certain aspects of motor carrier regulation have been altered by the Motor Carrier Act of 1980, Pub.L. 96-296 (1980 Act), the ICC asserted that "reduced entry barriers and emphasis on competition permit a 'more relaxed common carrier obligation'" (App. D, p. 43a, n.14). Accordingly, the ICC announced it would now "look at common carrier obligation issues in light of our overall regulatory policy and the prevailing competitive climate in the transportation industry" (*id.* at 43a-44a). Under the ICC's new approach, the obligation to serve is left to the regulated "carrier's assessment of the marketplace and its resources, as well as external events beyond its control" (*id.* at 44a). Moreover, "the obligation to serve . . . can and does change to reflect the commercial realities of the transportation marketplace and the attending scheme of regulation" (*id.*).

2. On judicial review, the Court of Appeals accepted the ICC's reasoning and its reinterpretation of the common carrier obligation under the Interstate Commerce Act. After noting that "the ICC currently 'look[s] at common carrier obligation issues in light of [its] overall regulatory policy and the prevailing competitive climate in the transportation industry,'" *B.J. Alan Co. v. I.C.C.*, 897 F.2d at 563, the Court of Appeals stated:

> We review the instant decision mindful of the Commission's *leitmotif*: "[T]he obligation to serve . . . can and does change to reflect the commercial realities of the transportation marketplace and the attending scheme of regulation." *Id.* Congress so signaled in the Motor Carrier Act of 1980. *See* 49 U.S.C. § 10101(a)(2); H.R. Rep. No. 1069, 96th Cong., 2d Sess. 14 (1980).

Id. Having thus satisfied itself "that the ICC has legitimately interpreted the statutory requirements" (*id.* at 564), the Court of Appeals affirmed *UPS II*.[3]

[3] Thereafter, the ICC denied reopening on other grounds in *UPS III*, served June 18, 1990 (App. C, p. 18a).

3. On June 21, 1990, this Court issued its decision in *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990). *Maislin* reversed the ICC's decisions in *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) (*Negotiated Rates I*) and 5 I.C.C.2d 623 (1989) (*Negotiated Rates II*), the latter decision having been issued only 16 days before *UPS II*. In *Maislin*, this Court rejected the ICC's claim that passage of the 1980 Act justified the new policies adopted by the agency in *Negotiated Rates*. Since nothing in the 1980 Act purported to modify the specific statutory provisions involved in that case, this Court rejected the ICC's conclusion that "in light of the more competitive environment, strict adherence to the filed rate doctrine 'is inappropriate and unnecessary to deter discrimination today'" (*Maislin*, 110 S.Ct. at 2770). Instead, this Court held that the ICC "does not have the power to adopt a policy that directly conflicts with its governing statute" when nothing in the 1980 Act repeals the underlying sections of the Act "or casts doubt on our prior interpretation of those sections" (*id.*).

4. In light of *Maislin*, petitioners, on June 26, 1990, filed a supplemental petition with the ICC.[4] Noting the parallels between the ICC's approach in *UPS II* and its discredited approach in *Negotiated Rates I* and *Negotiated Rates II*, petitioners renewed their arguments that the ICC's deviation from the plain language of the statute and from long-standing precedent of this Court was erroneous in light of this Court's supervening *Maislin* decision and the absence of any amendment to §11101(a) in the 1980 Act.

By its *UPS IV* decision served April 12, 1991 (App. B, p. 8a), the ICC declined to reopen. Stating that the "common carrier obligation never has been absolute, since it is tempered by a reasonableness determination" (*id.*, at 12a), the ICC as-

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[4] "Complainants' Further Petition for Reopening, Reconsideration and Oral Argument Based on *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*"

serted that UPS, due to the alleged difficulties associated with the transportation of fireworks, "can regard requests to transport fireworks as unreasonable and elect not to transport them" (*id.* at 13a). Insisting that its "*UPS II* decision is . . . consistent with the statutory requirements and judicial and agency interpretation of the common carrier obligation" (*id.* at 12a), the ICC claimed "the authority to adopt new policies" with respect to construction of the §11101(a) service obligation "when faced with new developments" in the marketplace as a result of the 1980 Act (*id.* at 13a). The ICC thus adhered in all respects to the legal analysis which this Court had specifically rejected in *Maislin*.

5. The Court of Appeals denied petitioners' petition for judicial review. According to the Court of Appeals, this Court's holding in *Maislin* that "generalized congressional exhortations to 'increase competition' cannot provide the ICC authority to alter . . . well-established statutory . . . requirements" (App. A, pp. 2a-3a) had been anticipated in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). On this basis, the Court of Appeals held that "*Maislin* does not . . . represent a change in the law governing the present case" (App. A, p. 3a). Accordingly, the court held that under the principles of *ICC v. Brotherhood of Locomotive Engineers,* 482 U.S. 270 (1987), the ICC's refusal to reopen was not subject to judicial review.

REASONS FOR GRANTING THE WRIT

In *Maislin,* this Court specifically rejected the precise reasoning that the ICC used in *UPS II* to reinterpret the common carrier obligation under the Interstate Commerce Act. In other cases, the ICC itself has recognized that *Maislin* is a "changed circumstance" warranting reopening of proceedings. *See Eastman Kodak Company – Petition for Declaratory Order – Certain Rates and Practices of Advance United Expressways, Inc.,* ICC Docket No. 40233 (July 8, 1991) (App. F, pp. 87a). In this case, however, the ICC refused to reopen its proceedings and the Court of Appeals let that decision stand. As a result, the

ICC's patently erroneous interpretation of the common carrier obligation may cause an entire segment of the fireworks industry to go out of business. This miscarriage of justice should not stand. Accordingly, this Court may want to consider summary reversal in light of *Maislin*.[5]

1. *Brotherhood of Locomotive Engineers* recognizes that "changed circumstances" permit judicial review of an agency's refusal to reopen.

In *Brotherhood of Locomotive Engineers, supra,* this Court noted that a showing of "changed circumstances" warrants judicial review of an ICC decision not to reopen a proceeding. (482 U.S. at 279). Plainly, a decision of this Court which repudiates the entire legal analysis previously used by the ICC is a "changed circumstance." Indeed, the ICC, in other cases, has recently held that "the Supreme Court's action in *Maislin* constitutes sufficient changed circumstances and imbues our prior decision with material error such as to warrant reopening[.]" *Eastman Kodak Company—Petition for Declaratory Order—Certain Rates and Practices of Advance United Expressways, Inc., supra* (App. F, p. 87a); *General Binding Corporation — Petition for Declaratory Order — Certain Rates and Practices of Advance United Expressways, Inc.,* ICC Docket No. 40398 (July 12, 1991) (App. G., p. 89a). The Court of Appeals itself has recognized that the judiciary "cannot blindly follow prior rulings in the face of clearly contradictory doctrine later enunciated by the Supreme Court." *Ralpho v. Bell,* 569 F.2d 607, 629 (D.C. Cir. 1977). *See also Melong v. Micronesian Claims Com'n,* 643 F.2d 10, 17 (D.C. Cir. 1980) (the law of the case should be followed unless "controlling authority has since made a contrary decision of the law applicable to such issues"). Accordingly, in a situation such as this, where the ICC has

[5] Should a remand be deemed necessary, this Court should enjoin UPS to provide service pending the final determination of this matter in order to terminate the financial losses which petitioners are experiencing.

openly refused to comply with a holding of this Court, and where its prior decision is openly in conflict with precedents of this Court, logic and fairness require judicial review.

That principle is particularly important here. Petitioners rely on this Court's longstanding construction of the unamended statutory common carrier obligation, and such reliance, prior to *Maislin*, was rejected by both the ICC and the Court of Appeals on review. In this narrow circumstance, *Brotherhood of Locomotive Engineers* does not bar review of the refusal to reopen to compel compliance with the supervening decision of this Court in *Maislin*. Otherwise, the ICC, and not this Court, would have the final word with respect to the interpretation of the statutory common carrier obligation and petitioners would be deprived of the benefits of a supervening decision of this Court which vindicated their positions before the agency and the reviewing court in the first instance.

2. *Square D* is not controlling.

The Court of Appeals held that *Maislin* was not a "changed circumstance" because it essentially reiterated the holding in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc., supra.* That analysis is mistaken. Although this Court in *Maislin* relied in part on *Square D* to correct the ICC's mistaken view of the law, there is a vast difference in the subject matter and holdings in the two cases. *Square D* involved the question of whether "carriers are subject to treble-damages liability in a private antitrust action" if rates filed with the ICC by motor carriers "were fixed pursuant to an agreement forbidden by the Sherman Act" (476 U.S. at 410). That question, in turn, required this Court to determine whether a long-standing judicial interpretation of the Interstate Commerce Act could be overturned by the *courts* in the absence of a "specific statutory provision or legislative history indicating a specific congressional intention to overturn [that precedent]" (*id.* at 420).

Square D did not involve an agency interpretation of its statute or involve any "question of agreeing or disagreeing with agency action" (*Maislin,* 110 S.Ct. at 2779 (J. Stevens, dissenting). Rather, *Square D* stands for the proposition that a Supreme Court precedent must be followed by the *courts* in the absence of express congressional action overruling the precedent. Standing alone, however, *Square D* does not modify the degree of deference to which administrative decisions may be entitled under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). As the ICC itself explained in *Negotiated Rates II*:

> *Square D* is inapposite because it dealt with the *courts*' authority to depart from long-standing *court* created precedent, which was deemed to have worked well and was believed to have been adopted by Congress, not an agency's right to interpret . . . or reinterpret its own statute.

5 I.C.C.2d at 634, n.29 (emphasis added).

While *Maislin* relied, in part, on *Square D* to correct the ICC's views with respect to its assumed power "to adopt new policies when faced with new developments in the industry" (*Maislin,* 110 S.Ct. at 2770), it is erroneous to suggest that *Square D*, by itself, imposed sweeping restrictions on the ICC's assumed ability to reinterpret settled constructions of the Interstate Commerce Act. If it had, there would have been no necessity for this Court to grant certiorari in *Maislin* or, having granted the writ, to dispose of the case with a full opinion.

3. Proper application of *Maislin* would require the ICC's decisions to be vacated as contrary to the text of the Interstate Commerce Act and to the long-standing precedents of this Court interpreting the common carrier obligation.

a. The ICC's reasoning in *UPS II* and *UPS IV* is repudiated by *Maislin*

As it had done in the *Negotiated Rates* decisions which were condemned in *Maislin*, the ICC in *UPS II* assumed the unfettered right to adopt new policies modifying this Court's long-standing interpretations of statutory sections **not** amended by the 1980 Act. Moreover, in *UPS II* the ICC premised its fundamental alteration of the common carrier obligation on changed regulatory and economic circumstances under the 1980 Act, even though the only such "changes" it identified are relaxed entry barriers and increased competition – the identical pretexts it seized on for its *Negotiated Rates* decisions. The ICC never explained why those changes (which favor shippers) should relieve common carriers of their traditional obligation to serve those shippers. As *Maislin* indicates, even if some "policy" justification for relaxing a statutory requirement could be identified by the ICC, that does not warrant its overriding Congress' specific decision *not* to disturb the statute.

In light of *Maislin*, the ICC's ruminations about the more competitive environment since enactment of the 1980 Act cannot justify relieving carriers of the requirement of strict adherence to the statute, or provide carriers the discretion to discriminate among shippers in holding out service. Nor can the ICC's assertion that "the obligation to serve . . . can and does change to reflect the commercial realities of the transportation marketplace and the attending scheme of regulation" (App. D, p. 44a) be meshed with the mandatory language of § 11101(a) that a "common carrier . . . **shall** provide . . . transportation or service on reasonable request" (emphasis added). By allowing

the carrier to decide whether to provide service depending on its "assessment of the marketplace" and "the attending scheme of regulation" (App., p. 44a), the ICC flatly ignores the mandatory language of the statute.

As long recognized, a common carrier obligation that is dependent only upon the carrier's changing assessment of the marketplace would enable the carrier, for whatever purpose, "to destroy any industry depending upon such carrier for the transportation of its product." *Crescent Liquor Co. v. Platt*, 148 F. 894, 901 (C.C.W.Va. 1906). This early recognition of the problems that would follow from allowing common carriers to "regulate" the flow of commerce is of continuing importance. Because the statute provides no basis for placing the fireworks industry, or any other industry, at the mercy of the common carrier's assessment of the marketplace, the ICC's easing of the statutory obligation must be reversed.

The ICC's failure to adhere strictly to the text of the statute in *UPS II* not only stands condemned by *Maislin*, but places shippers "entirely at the mercy of the carrier, contrary to the overriding purpose of the Act." *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 88 (1962). Given their repugnance to the text of the statute and to the National Transportation Policy (*see infra,* p. 19), *UPS II* and *UPS IV* are irreconcilable with *Maislin* and with the many precedents of this Court strictly interpreting the statutory common carrier obligation.[6]

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[6] The ICC's effort to distinguish *Maislin* is wholly unconvincing. (App. B, p. 12a, n. 4). To bolster its claim that its rationale in *UPS II* was *ab initio* consistent with *Maislin* and other precedents of this Court defining the common carrier obligation, the ICC resorts to bald misstatement of those precedents which have consistently defined the common carrier obligation for over a hundred years.

The ICC cites *Louisville & Nashville R.R. v. Cook Brewing Co.*, 223 U.S. 70 (1912) (*Cook Brewing*) for the proposition that "under the Interstate Commerce Act a railroad does not violate its common-carrier obligation by refusing shipments where the transportation would violate State law" (App. B, p. 12a n.4). The actual holding in *Cook Brewing* is that, under the

b. The ICC deliberately ignored the actual holdings of the decisions of this Court which were incorporated in the original Interstate Commerce Act and which are the foundation of the current statutory provision setting forth the common carrier obligation.

Had the Court of Appeals addressed the merits and applied the *Maislin* principles, it would have been compelled to reject the ICC's use of latter-day agency-made policies as being contrary to the holdings of this Court which provide the foundation of the mandatory statutory language of § 11101(a). The statutory mandate is founded on decisions of this Court – as recognized even in *UPS II* (App. D, p. 41a) – which predated

Interstate Commerce Act, a carrier violates its common carrier obligation by refusing shipments of legitimate articles of commerce moving in interstate commerce – even though the carrier has attempted to justify its refusal to serve on the grounds that local laws prohibit the delivery of such commodities. *Cook Brewing, supra,* 223 U.S. at 83.

The disingenuous nature of the ICC's reasoning is also demonstrated by the fact that in *UPS II,* the ICC declined to follow *Cook Brewing* and *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888), commenting that "[w]e are not persuaded by complainants' arguments . . . based on cases concerning the transportation of alcoholic liquors that date from years preceding both the enactment and repeal of the 18th Amendment to the U.S. Constitution" (App. D, p. 45a). Instead, the ICC "followed" a lower court decision in *Cohen v. Bredehoeft*, 290 F. Supp. 1001 (S.D. Tex. 1968), *aff'd* 402 F.2d 61 (5th Cir. 1968), *cert. denied*, 393 U.S. 1086 (1969) which did not involve interstate commerce.

The ICC's reliance on *York Company v. Central Railroad*, 70 U.S. (3 Wall.) 107, 112 (1865) for the proposition that a carrier "may limit his services to the carriage of particular kinds of goods" (App. B, p. 12a n.4) is also misplaced. The following sentence in *York* is that a carrier "is bound to accept all goods offered within the course of his employment, and is liable to an action in case of refusal" (*York, id.*).

Finally, the ICC distorts the holding in *Pennsylvania R.R. v. Puritan Coal Co.*, 237 U.S. 121 (1915) by claiming that it stands for the bare proposition that "the law exacts only what is reasonable from such carriers" (id. at 12a n.4). In *Pennsylvania*, this Court found that the railroad had violated its

the original enactment of the Interstate Commerce Act in 1887.[7] *See, e.g., New Jersey Steam Nav. Co. v. Merchants' Bank of Boston*, 47 U.S. (6 How.) 344, 382-3 (1848); *The Niagara v. Cordes*, 62 U.S. (21 How.) 7 (1859); *Parrot v. Wells (The Nitro-glycerine Case)*, 82 U.S. (15 Wall.) 524 (1873). As this Court tersely reasoned in *The Niagara v. Cordes*:

> Most of the rules of law prescribing the duties of a carrier for hire, and regulating the manner of their exercise, have existed for centuries, and *they cannot be modified or relaxed except by the interposition of the legislative power of the Constitution*. Time and experience have shown their value and demonstrated their utility and justice, and they ought not and cannot be changed by the judiciary.

62 U.S. at 25 (emphasis added). That reasoning, equally valid today, must be applied to the *UPS II* decision of a bare majority

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common carrier obligation to provide a proper number of cars to the shipper during a period of shortage caused by a strike. In upholding the shipper's right to damages, this Court reasoned:

> Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the carrier's line. But that is not an absolute right, and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made, and which it could not reasonably have been expected to meet in full. The common law of old, in requiring the carrier to receive all goods and passengers, recognized that "if his coach be full" he was not liable for failing to transport more than he could carry.

Pennsylvania, 237 U.S. at 133. Clearly, nothing in this Court's reasoning supports the use of tariff restrictions to exclude service on a discriminatory basis when the carrier has existing capacity and actively transports articles similar to those which it refuses to transport for one group of shippers.

[7] Pursuant to Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1466, former sections 1(4) and 316(b) of the Interstate Commerce Act were recodified, without substantive change, as 49 U.S.C. § 11101(a).

of the ICC which, without a specific mandate from the Congress, assumed the power to modify and relax the centuries-old standards governing the common carrier obligation.

Without question, the statutory common carrier obligation, along with the filed rate doctrine at issue in *Maislin*, is one of the cornerstones of the Interstate Commerce Act and is essential to preventing discrimination.[8] The essence of the common carrier obligation is to serve all shippers, without discrimination, to the extent of the carrier's ability and capacity. *Michigan P.U.C. v. Duke*, 266 U.S. at 577. *See also, American Trucking Associations, Inc. v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 406-7 (1967); *Montgomery Ward & Co. v. Northern Pacific Terminal Co. of Oregon*, 128 F. Supp. 475, 490-96 (D. Ore. 1953) (detailed discussion). As reflected by these cases, this Court has consistently invoked the common carrier obligation in condemning various practices devised by carriers to avoid their overall responsibilities to the shipping public in order to concentrate on more lucrative traffic.[9]

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[8] While *Maislin* arose under §§ 10761 and 10762 of the Act, those sections, in terms identical to those of § 11101(a), require strict adherence to the statutory duties enumerated therein. A common carrier providing transportation or service subject to the Act "*shall* provide the transportation or service on reasonable request" (§ 11101(a)) and "*shall* provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter" (§ 10761). Given the identical nature of the statutory language and the common purpose of these interrelated sections, it is irrational to suggest, following *Maislin*, that §§ 10761 and 10762 must be strictly adhered to, while a decision to provide transportation and service under § 11101(a) is left to the carrier's discretion "in the circumstances at the time of the service request." The same principles of construction that were applied in *Maislin* are applicable here.

[9] Under this Court's strict interpretation of the statutory common carrier obligation, the "facts" found by the ICC to justify UPS' termination of service to the fireworks industry are simply irrelevant. Precedents of this Court counter every one of the "excuses" for non-service which the ICC accepted under its new standard. *See, e.g., Louisville & Nashville R. Co. v. Cook Brewing Co., supra* (local ordinances prohibiting use and consumption of

No provision of the Motor Carrier Act of 1980 purports to abolish that historic common carrier obligation. Moreover, the legislative history of the 1980 Act specifically shows that the Congress' easing of entry barriers was *not* to be interpreted as repudiating or modifying that obligation. *See* 126 Cong. Rec. H15,583 (daily ed., June 19, 1980) (remarks of Rep. Howard, Chairman of the Surface Transportation Subcommittee) ("None of these provisions eliminate or weaken the carriers' obligation to perform the service they are authorized to perform under their certificate"). As Representative Shuster, ranking Republican member of the Surface Transportation Subcommittee, emphasized:

> Without this compromise, without this legislation, the ICC, the bureaucrats downtown, would proceed to deregulate the trucking industry .... We were very

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particular commodities do not excuse a common carrier of duty to transport in interstate commerce); *American Trucking Ass'ns. Inc. v. Atchison, T. & S.F. R. Co., supra* (common carrier may not offer service to some shippers and deny that same service to other shippers); *see also, Associated Truck Lines, Inc. v. U.S.*, 304 F. Supp. 1094 (W.D. Mich. 1969), *aff'd per curiam*, 397 U.S. 42 (1970) (common carrier of general commodities may not, through tariff publication, decline particular items because of alleged operational difficulties vis-a-vis other general commodities).

Furthermore, UPS' lame "economic hardship" excuse is inapposite. *See, Director General of Railroads v. Viscose*, 254 U.S. 498, 503 (1921) (common carrier, through tariff publication, may not decline specific items on grounds that costs of transportation are greater than traffic would bear); *see also, Restrictions On Service By Motor Common Carriers*, 111 M.C.C. 151, 164 (1970) (common carrier may *not* concentrate on "lucrative" traffic and "refuse service to less desirable traffic"). There is no indication that UPS ever failed to make a profit from the transportation of parcels of common fireworks. At most, it showed that its profit margin may have been decreased due to additional costs associated with compliance with DOT regulations and because of the volume in shipments shortly before the 4th of July. Although the ICC premised its refusal to reopen on the assertion that common fireworks are "the only Class C commodities widely distributed by mail order in enormous volumes during a compressed time frame" (App. B, p. 14a n.5),

> mindful of this problem and for that reason this bill does not go the whole way with regard to deregulation. This bill does provide, and this is an extremely important point, this bill **continues to provide for the common carrier obligation**. If a common carrier today has a certificate requiring him to provide service to a particular area, be it rural or urban, he has the obligation under this legislation and that obligation continues.

126 Cong. Rec. H15,591 (daily ed., June 19, 1980) (emphasis added). Thus, in enacting the 1980 legislation, Congress did *not* intend to strip shippers of the fundamental protection they have enjoyed under the Interstate Commerce Act for over 100 years.

c. The 1980 Act, far from relaxing the common carrier obligation, actually reinforced its consumer protection rationale.

Consistent with the ICC's recognition in prior reports to Congress that the "total concept of the act has always been acknowledged to be protection of the consumer,"[10] Congress,

UPS never claimed a lack of existing capacity to handle the volume of traffic, even at the height of the fireworks season.

Also, in November 1990, UPS announced it would impose a $5 surcharge on all parcels of hazardous materials in order to cover the additional costs associated with the transportation of those other commodities. This concession that UPS incurs additional costs for *all* hazardous materials and not simply common fireworks effectively destroys the ICC's economic rationale for allowing UPS to discontinue service to petitioners. Yet, when petitioners demonstrated that the surcharge, if applied to common fireworks, would more than recoup UPS's alleged costs in handling these commodities, the ICC downplayed the cost element with the off-hand admission that its prior decision had not "depended upon a precise accounting of UPS's costs in handling common fireworks" (App. B, p. 15a).

[10] ICC, *88th Annual Report to Congress,* 1974, at 3; *see also*, ICC, *87th Annual Report to Congress,* 1973, at 2; ICC, *86th Annual Report to Congress,* 1972, at 3. As the ICC also reported to Congress, the use of tariff restrictions to allow carriers to avoid traffic that was less lucrative and more costly to

in the 1980 Act, added a specific requirement that the ICC, while promoting "economical[] and efficient transportation" (49 U.S.C. §10101(a)(1)(B)), must regulate transportation so as to "meet the needs of . . . consumers" 49 U.S.C. §10101(a)(2)(B). This was ignored by the ICC in *UPS II* when it relegated consumers to other services which the ICC repeatedly recognized to be "more expensive and less convenient" (App. D, p. 48a). *See also* App. C, pp. 21a, 22a-23a. Given the undeniable fact that petitioners' businesses have been decimated because consumers cannot afford the "huge disparity between rates charged by UPS for small packages of fireworks and the rates listed by others for carrying these commodities" (App. E, p. 68a), the ICC's new standard is at odds with the intent of the statute, as well as its literal wording.[11] Under the traditional legal standard which Congress intended not to disturb, and under *Maislin*, that is the end of this case.

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transport was the subject of various ICC investigations and complaint proceedings designed to prohibit such unlawful practices, including, for example, *Restrictions On Service By Motor Common Carriers*, 111 M.C.C. 151 (1970); *Restrictions on Service by Motor Carriers-Compliance Reports and Interpretations*, 119 M.C.C. 691 (1974); *National Furniture Traffic Conference, Inc. v. Associated Truck Lines, Inc.*, 332 I.C.C. 802 (1968), *aff'd sub nom. Associated Truck Lines, Inc. v. United States*, 304 F. Supp. 1094 (W.D. Mich. 1969), *aff'd per curiam*, 397 U.S. 42 (1970).

[11] B.J. Alan testified that "approximately sixty percent of consumers which have sought to place purchase orders through B.J. Alan's mail order business have refused to pay for the increases in shipping" (Ex. 50, Verified Statement Burda at 6). This resulted in a loss of "anticipated gross revenues [of] $4.2 million from the mail order business" (*id.*) in that year. Similar declines in revenues and projected revenues associated with mail order sales were identified by every one of the fireworks companies which appeared before the ICC.

CONCLUSION

The ICC's refusal to reopen in light of *Maislin* in order to correct its fundamental error must be overturned. Thus, the petition for a writ of certiorari should be granted, and the Court may wish to consider summary reversal.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1358

September Term, 1991

B.J. Alan Company, Olde Glory Marketing, Limited, Neptune Fireworks Company, Inc.; Consigned Sales Company, Inc.,

Petitioners

v.

Interstate Commerce Commission and United States of America,

Respondents

United Parcel Service, Inc. (Ohio), *et al.*,

Intervenors

BEFORE: Edwards, Silberman and Williams, Circuit Judges

JUDGMENT

Upon consideration of the motion seeking setting for oral argument and expedited handling, the motion for summary affirmance, the response to motion seeking setting for oral argument and memorandum in support of motion for summary affirmance, the reply, and the motion for summary reversal contained therein, it is

ORDERED that the motions for summary disposition be construed as motions to proceed under D.C. Cir. Rule 13(i) and granted. It is

FURTHER ORDERED AND ADJUDGED that the petition for review be denied for the reasons set forth in the accompanying memorandum. It is

FURTHER ORDERED that the motion seeking setting for oral argument and expedited handling be dismissed as moot.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

No. 91-1358 - *B.J. Alan Co., et al. v. ICC*

MEMORANDUM

In 1989, the Interstate Commerce Commission allowed United Parcel Service to discontinue transportation of common fireworks. *See B.J. Alan Co. v. UPS*, 5 I.C.C.2d 700 (1989). This court affirmed. *B.J. Alan Co. v. ICC*, 897 F.2d 561 (D.C. Cir. 1990). Petitioners, shippers of common fireworks, seek review of the ICC's subsequent denial of two petitions to reopen the proceedings. They challenge the ICC's rejection of four grounds for reopening and assert that the ICC incorrectly denied other fireworks shippers and trade groups leave to intervene. Because we conclude that petitioners' claims are unreviewable or meritless, we deny the petition for review.

Once a case has been fully litigated, we do not reconsider our disposition of the case or review an agency's denial of a request to reopen the proceedings absent a showing of new evidence or changed circumstances. *See ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 278-80 (1987). Petitioners claim changed circumstances in the Supreme Court's holding with respect to the Motor Carrier Act of 1980 in *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990). They rely on the Court's holding that "[g]eneralized congres-

sional exhortations to 'increase competition' cannot provide the ICC authority to alter . . . well-established statutory . . . requirements." *Id.* at 2770. This aspect of *Maislin* does not, however, represent a change in the law governing the present case. *See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 420 (1986) ("Petitioners have pointed to no specific statutory provision or legislative history indicating a specific congressional intention to overturn the [Supreme Court's] longstanding . . . construction; harmony with the general legislative purpose [of the Motor Carrier Act] is inadequate for that formidable task.") (footnote omitted). Therefore, petitioners' claim that the ICC erred in refusing to reconsider its evaluation of the common carrier obligation in light of *Maislin* is unreviewable.

Petitioners' claim that the ICC erred in refusing to reexamine its finding of a cross-subsidy is likewise unreviewable. Although petitioners characterize as new evidence the statement of an economist opining that the ICC erred in finding a cross-subsidy, petitioners' argument is in fact a claim that the ICC committed material error in defining and applying the term "cross-subsidy." Because petitioners could have raised this claim on petition for review of the ICC's initial decision, this court may not review the agency's refusal to reopen on this basis.

Although petitioners' request that the ICC reopen the proceedings in light of United Parcel Service's imposition of a $5 surcharge on all shipments of hazardous materials was based on changed circumstances, the ICC did not abuse its discretion in denying the request to reopen. The ICC's initial decision rested on findings of both economic and operational impracticability. Moreover, there was evidence before the ICC that the costs of altering UPS's system to attempt to accommodate common fireworks would be significant and would not guarantee a smooth integration of common fireworks into UPS's service pattern. Finally, there was evidence before the ICC that

transportation of common fireworks was more burdensome than transportation of other hazardous materials. In these circumstances, the ICC did not abuse its discretion in refusing to reopen in light of the surcharge imposed on other hazardous materials.

The ICC also did not abuse its discretion in denying petitioners' request to reopen on the basis of the Hazardous Materials Transportation Uniform Safety Act of 1990 ("HMTUSA"). HMTUSA requires the Secretary of Transportation to issue regulations governing the transportation of hazardous materials. 49 U.S.C. App. § 1804(a)(1) (Cum. Supp. 1991). Petitioners assert that HMTUSA preempts state and local regulations that are inconsistent with the common carrier obligation, regulations that the ICC found made transportation of fireworks impracticable for UPS. The Act, however, preempts only state and local regulations that are inconsistent with "this chapter" ("Chapter 27—Hazardous Materials Transportation"), not regulations that are inconsistent with other parts of Title 49. *See* 49 U.S.C. § 1811(a)(1). Because the common carrier obligation is not part of "this chapter," petitioners' claim is meritless.

This claim is also premature. Because the Secretary has yet to promulgate the relevant regulations, it is impossible to determine which state and local regulations, if any, will be preempted. Finally, HMTUSA does not address the patchwork of state and local regulations concerning the sale, possession, and use (as opposed to transportation) of fireworks that concerned the ICC in the initial proceedings.

Petitioners' last contention is that the ICC erred in denying various fireworks shippers and trade groups leave to intervene. Petitioners assert that in denying leave to intervene, the ICC failed to consider the full impact of UPS's actions on the American fireworks industry. When considering the requests to reopen, however, the ICC had before it verified statements from

fireworks shippers concerning the impact of its initial decision, and petitioners have made no attempt to demonstrate what the potential intervenors would have added to this showing. Thus, the ICC did not abuse its discretion in denying leave to intervene.

Because petitioners' claims are unreviewable or meritless, we deny the petition for review.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1358

September Term, 1991

B. J. Alan Company, Olde Glory Marketing, Limited, Neptune Fireworks Company, Inc.; Consigned Sales Company, Inc.,

Petitioners

v.

Interstate Commerce Commission and United States of America,

Respondents

Filed December 10, 1991

BEFORE: Edwards, Silberman and Williams, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing filed October 22, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1358

September Term, 1991

B. J. Alan Company, Olde Glory Marketing, Limited, Neptune Fireworks Company, Inc.; Consigned Sales Company, Inc.,

Petitioners

v.

Interstate Commerce Commission and United States of America,

Respondents

Filed December 10, 1991

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

Petitioners' Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK
BY:
Robert A. Bonner
Deputy Clerk

Appendix B

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-30093

B. J. ALAN COMPANY, INC., *et al.*

v.

UNITED PARCEL SERVICE, INC., *et al.*

Decided: April 5, 1991

On June 26, 1990, B. J. Alan Company, Inc., Neptune Fireworks Company, Inc., and Olde Glory Marketing Limited filed a petition to reopen this proceeding, based on the Supreme Court's decision in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, ___ U.S. ___, 110 S.Ct. 2759 (*Maislin*). We will deny the petition.

This case involves a tariff provision published by United Parcel Service (UPS), a motor common carrier specializing in transporting small parcels, limiting the service it provides by excluding the transportation of common fireworks. Originally, in *B.J. Alan Co. v. United Parcel Service*, 4 I.C.C.2d 704 (1988) (*UPS I*), the Commission ordered UPS to restore this service. In *B. J. Alan Co. v. United Parcel Service*, 5 I.C.C.2d 700 (1989) (*UPS II*), however, we reversed the earlier decision and dismissed the complaint against UPS's tariff exclusion. The United States Court of Appeals for the District of Columbia Circuit affirmed *UPS II* in *B. J. Alan Co., Inc. v. ICC*, 897 F.2d 561 (D.C. Cir. 1990). We subsequently denied, in a decision

(not printed) served June 18, 1990, a petition by complainants to reopen the proceeding.[1]

PRELIMINARY MATTERS

A. *Disqualification of Counsel.* Complainants seek to have a Commission employee disqualified from any further

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[1] A petition for review of that decision has been dismissed as premature by the United States Court of Appeals for the Sixth Circuit, in No. 90-3715, *B. J. Alan Company, Inc. v. Interstate Commerce Commission and United States of America* (December 13, 1990).

Our decision served June 18 did not address pleadings filed after June 1, 1990 (the actual decision date), or before the June 18, 1990, service date. Those pleadings now are moot. They include:

- Complainants' Emergency Request for Oral Hearing on Petition for Reopening, filed June 4, 1990;
- Motion of Respondents United Parcel Service, Inc. (OH), and United Parcel Service, Inc. (NY), to Strike Complainants' Emergency Request for Oral Hearing on Petition for Reopening, filed June 5, 1990; and
- Complainants' Reply to UPS Motion to Strike, filed June 7, 1990;

They also include two pleadings that addressed issues of tariff interpretation that fall beyond the scope of this complaint proceeding:

- Complainants' Supplemental Motion to Reopen because of Changed Circumstances and Request for Emergency Declaration, filed June 14, 1990; and
- Reply of Respondents United Parcel Service, Inc. (OH), and United Parcel Service, Inc. (NY), to Complainants' Supplemental Motion to Reopen because of Changed Circumstances and Request for Emergency Declaration, filed July 5, 1990.

Our decision here is without prejudice to complainants' filing a new complaint or petition for declaratory order addressing the tariff definition of common fireworks.

In addition, "Complainants' Motion to Strike CPSC Portion of Respondents' Reply to Complainants' Supplemental Motion to Reopen," filed July 9, 1990, and respondents reply thereto, filed July 30, 1990, are also moot and will not be addressed herein.

participation in the decision-making process in this case. The employee, an attorney in our Office of General Counsel, defended our *UPS II* decision on judicial review. Complainants do not allege misconduct, but suggest that the employee could not be an impartial adviser to the Commission in this case because he worked with respondent's attorneys in opposing complainants' judicial appeal.

We are not persuaded that the employee should be disqualified. The cases[2] that complainants cite in support of the employee's disqualification involved individuals who had been promoted to a decision-making position. The employee at issue here is not an official in a decision-making capacity. There is, therefore, no danger of subverting the "principle that a party should not be a judge in his own case." *American General Ins. Co. v. FTC, supra [n.4]*, 589 F.2d at 463.

We see no reason why we may not receive the advise and counsel of this attorney. The employee represented the Commission – and no other party – in court. Vigorous advocacy of a client's position in court does not diminish an attorney's professional ability to render balanced, impartial advice to his client outside the courtroom.

To grant complainants' unfounded request would unnecessarily restrict the agency's ability to consult with its counsel regarding the advisability and defensibility of the various actions available to it. In addition, we depend upon the General Counsel and his staff to defend in court whatever action we ultimately decide to take. If the complainants' reasoning were followed, it could prevent the agency from obtaining the advice of its General Counsel in any case that already has been in court. Disqualification is not only unnecessary, but institutionally inappropriate. We will deny the motion seeking to disqualify this individual from advising the Commission with regard to this matter.

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[2] *American General Ins. Co. v. FTC*, 589 F.2d 462 (9th Cir. 1979) and *Trans World Airlines v. CAB*, 254 F.2d 90 (D.C. Cir. 1958).

B. *Intervention.* Consigned Sales Company, Inc., Seasonal Merchandise, Inc., San Diego Fireworks, Inc., Wisconsin Fireworks Association, Indiana Fireworks Distributors Association, Inc., and Pennsylvania Pyrotechnics Association seek reconsideration of our denial of their earlier requests for intervention.[3] In the alternative, they ask that we treat their pleading as an amicus statement in support of the complainants' position. They do not, however, explain how their participation would add to the record already before us. We find no good cause to permit intervention of additional parties at this stage of the case.

C. *Oral Argument.* Complainants have requested oral argument in this matter, but have offered no substantive reasons to support the request. We find no need for oral argument and will deny the request.

DISCUSSION AND CONCLUSIONS

Complainants base their current petition for reconsideration on the Supreme Court's recent decision in *Maislin*, *supra*. There, the Court held that our negotiated rates policy that we had adopted in *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989) (*Negotiated Rates*) violated the 'filed rate doctrine'. That policy held that the collection retroactively by a carrier of the filed tariff rate for a shipment it had transported at a negotiated, and usually lower, but unfiled rate was an unreasonable practice. In rejecting that policy, the Court relied on 49 U.S.C. §§ 10762 (which requires carriers to file tariffs specifying their rates), 10761(a) (which prohibits a carrier from charging or receiving a different compensation than the rate specified in its tariff), and 10741 (which prohibits rate discrimination), and on its prior decision. *Maislin*, 110 S.Ct. at 2762, 2765-2768.

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[3] We denied their requests in our June 18 decision.

Complainants assert that the core issue before the Commission in this matter is—as in *Maislin*—the meaning of "unreasonable practices" under 49 U.S.C. §10701(a). They argue that the Commission has in this matter "deviated from the plain language of the statute and long-standing Supreme Court precedent" without express statutory authorization.

Complainants characterize the *UPS II* decision as enunciating a new policy that, "for the first time in the Commission's history," gives common carriers discretionary authority to provide service on a selective basis to an extent less than existing operational capability. They maintain that *Maislin* makes it clear that the Commission is without power to establish such a new policy. They focus particularly on precedents defining the common-carrier obligation as a duty to "serve all, up to the capacity of [the common carrier's] facilities without discrimination and for reasonable pay." Consequently, they argue, the Commission is bound by the principles enunciated in *Maislin*, to the effect that the Commission is not free to ignore the common law principles that have been incorporated into the statute through Supreme Court precedents. Complainants also note that the Court in *Maislin* rejected the Commission's argument that the more competitive environment since enactment of the Motor Carrier Act of 1980 relieves the requirement of strict adherence to the statute.

As we noted in *UPS II* (5 I.C.C.2d at 711) and as the court noted in upholding our decision (897 F.2d at 564), the common carrier obligation never has been absolute, since it is tempered by a reasonableness determination. 49 U.S.C. 11101(a) requires only that a carrier provide a service upon reasonable request. Our *UPS II* decision is, therefore, consistent with the statutory requirements and judicial and agency interpretation of the common carrier obligation.[4] Due to the difficulties, both operational

[4] *See York Company v. Central Railroad*, 70 U.S. (3 Wall.) 107, 112 (1865) (at common law a carrier "may limit his services to the carriage of particular kinds of goods"); *Louisville & Nashville R.R. v. Cook Brewing Co.*,

and legal, that UPS has associated with the transportation of common fireworks, UPS can regard requests to transport fireworks as unreasonable and elect not to transport them.

Because there is no conflict with the governing statute or with Supreme Court precedent, we have the authority to adopt new policies with reference to certificates as the measure of the carrier's obligation to provide service when faced with new developments. See *Maislin*, 110 S.Ct. at 2770, citing *American Trucking v. A., T. & S. F. R. Co.*, 387 U.S. 397 (1967). And as we pointed out in *UPS II* (5 I.C.C.2d at 712-713), our decision is consistent with our policy with respect to the common carrier obligation, as adopted in *Elimination of Certificates As the Measure of "Holding Out"*, 48 Fed.Reg. 11,136 (1983), which is that a

> common carrier is not in violation of its obligations if it declines to provide service within the scope of its operating authority because such service is economically or operationally impracticable in the circumstances at the time of the service request.

This position, we note, was explicitly affirmed by the United States Court of Appeals for the District of Columbia Circuit in reviewing our decision. *B.J. Alan Co., Inc. v. ICC*, *supra*, 897 F.2d at 564.

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223 U.S. 70 (1912) (under the Interstate Commerce Act a railroad does not violate its common-carrier obligation by refusing shipments where the transportation would violate State law); *Pennsylvania R.R. v. Puritan Coal Co.*, 237 U.S. 121, 133 (1915) ("the law exacts only what is reasonable from such carriers"); *Emporium v. New York Central R. Co.*, 214 I.C.C. 153 (1936) (rail carrier not obligated to transport precious metals which entail unique handling problems); *Transportation of Circuses and Show Outfits*, 299 I.C.C. 330 (1956) (carrier need not transport circus equipment because of specialized nature of transportation request); *Montgomery Ward & Co., Inc. v. Consolidated Freightways*, 42 M.C.C. 225 (1943) (motor carrier can refuse requests where such transportation has become impossible or impracticable because of circumstances beyond its control, as, for example, a strike).

Just as in *UPS II*, we see no merit in complainants' arguments based on common law, the present statute, or case law. In short, because our policy regarding the common carrier obligation does not conflict with the statute or Supreme Court precedent, complainants' reliance on *Maislin* as a basis to reopen is misplaced.

Additional Pleadings. Complainants have filed a supplement to their petition to reopen, noting that UPS has recently imposed a surcharge of $5 on all shipments of hazardous materials. Complainants argue that this surcharge "destroys" UPS's uniform rate structure, upon which our findings in this matter, complainants assert, depend. We disagree. The record and our prior decision in this matter clearly identify more bases for sustaining UPS's actions than the uniformity of its tariff structure. Likewise, the evidence is clear that shipments of fireworks have presented significantly greater operational difficulties to UPS than have shipments of any other hazardous commodity. *See UPS II*, 5 I.C.C.2d 702-704 and at 707, n. 5, which specifically summarized UPS's evidence on this point.[5] Thus, we do not find this new surcharge on hazardous materials to present any grounds requiring that we reopen this proceeding.

Since the date of our voting conference in this matter, complainants also have filed a petition seeking a special Commission conference or, in the alternative, oral argument before issuance of a written decision. Complainants seek to rebut what

[5] We noted that UPS had asserted that the costs associated with transporting common fireworks far exceeded those in transporting any other Class C commodities and that these costs were unique to the movements of common fireworks – the only Class C commodities widely distributed by mail order in enormous volumes during a compressed time frame. These costs included "compliance with diverse and non-uniform State and local regulations[.]" The decision reflects, indeed, that UPS had presented specifically evidence that other Class C commodities it transported moved in such small quantities that there was no problem keeping loads on individual vehicles within allowable limits, nor were such commodities widely shipped to private residential addresses.

they characterize as "seriously mistaken statements of law and fact by the Commission's staff during the most recent open voting conference." Respondents have replied and have moved that we reject and return the pleading as improper.

Complainants' pleading is, in essence, an effort to reargue, under the guise of considering the impact of new legislation, a variety of issues that already have been settled and decided. It is inappropriate for complainants to seize upon the free and frank discussion of the issues relevant to this proceeding, which takes place in the context of an open voting conference, as an opportunity to file further papers in this matter. Nevertheless, we shall not reject the pleading. Instead, we prefer to deal with the issues it raises on the merits without further delay.

This latest pleading essentially argues two issues: (1) that the recent enactment of the Hazardous Materials Transportation Uniform Safety Act of 1990, Pub. L. No. 101-615, 104 Stat. 3244 (1990), preempts State and local regulation of the transportation of common fireworks; and (2) that the surcharge discussed above, if applied to common fireworks, would more than recoup UPS's alleged costs in handling those commodities.

We do not see that the recent legislation with regard to transportation of hazardous materials is relevant to the issues in this proceeding. The argument relies on an interpretation of the common carrier obligation that we (and the reviewing Federal court) have rejected specifically (as we have already discussed in this decision). Moreover, the legislation does not purport to preempt State and local laws and regulations prohibiting the possession by or delivery to individuals of common fireworks.

As to the second issue, we note simply that our prior decision has no more depended upon a precise accounting of UPS's costs in handling common fireworks than it has upon the other issues complainants have raised belatedly and that we have discussed in this decision.

We find, accordingly, no reason to reopen this matter for reconsideration.

It is ordered:

1. Complainants' motion seeking disqualification of counsel from adjudicatory functions is denied.

2. The motion seeking reconsideration of the denial of intervention or, in the alternative, treatment as amicus statement in support of complainants' petition to reopen is denied.

3. The request for oral argument is denied.

4. The petition to reopen based on the *Maislin* decision is denied.

5. The petition to reopen based on a change in UPS's rate structure is denied.

6. The petition seeking a special Commission conference or, in the alternative, oral argument before the issuance of a written decision is denied.

7. Respondents' motion to reject and to return complainants' petition seeking a special Commission conference or oral argument is denied.

8. This decision is effective on April 12, 1991.

By the Commission, Chairman Philbin, Vice Chairman Emmett, Commissioners Simmons, Phillips, and McDonald. Commissioner Simmons concurred in part and dissented in part, with a separate expression.

Sidney L. Strickland, Jr.
Secretary

(SEAL)

COMMISSIONER SIMMONS, concurring in part, dissenting in part.

I continue to take the position that UPS's actions with regard to the transportation of common fireworks are in violation of the common carrier obligation. For certain, the common carrier obligation is not absolute, but is tempered by a reasonableness requirement. As I see it, UPS's activities have not met this reasonableness test and the carrier's motives for its actions lack merit and are not supported by sufficient facts. My previous separate expressions lay out the reasons for this position.

On the issue of UPS's $5.00 surcharge on shipments of hazardous materials, I believe that petitioners have raised serious questions that should be explored further. Indeed, the Commission's earlier decision placed considerable weight on UPS's uniform rate structure in finding that the carrier's actions were justified and reasonable. I find it intriguing that the majority now retreats from this earlier emphasis on the carrier's uniform rate structure as a basis for denial for shipper relief.

Appendix C

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-30093

B.J. ALAN COMPANY, INC., et al.

v.

UNITED PARCEL SERVICE, INC., et al.

Decided: June 1, 1990

This case involves a tariff provision published by United Parcel Service (UPS), a motor common carrier specializing in transporting small parcels, limiting the service UPS held out by excluding the transportation of common fireworks. The Commission previously considered the matter in *B. J. Alan Co. v. United Parcel Service*, 4 I.C.C.2d 704 (1988) (*UPS I*), and 5 I.C.C.2d 700 (1989) (*UPS II*).

In *UPS I*, the Commission found the challenged tariff provision to be unreasonably discriminatory and ordered UPS to restore service. In *UPS II*, the Commission reversed, finding the challenged tariff provision not to be unreasonably discriminatory or otherwise unlawful, and dismissed the complaint. The United States Court of Appeals for the District of Columbia Circuit affirmed *UPS II* in *B. J. Alan Co., Inc. v. ICC*, 897 F.2d 561 (D.C. Cir. 1990). On March 19, 1990, complainants[1] filed

[1] The complainants are B. J. Alan Company, Inc., Neptune Fireworks Company, Inc., and Olde Glory Marketing Limited.

a petition to reopen this proceeding.[2] UPS replied in opposition.[3]

Complainants seek to reopen this proceeding on the basis of new evidence, substantially changed circumstances, and material error. They assert changed circumstances on the basis of alleged new evidence demonstrating that Federal Express's service is no longer available as an alternative to many shippers of common fireworks. They also claim that the Commission's finding of cross subsidy constitutes material error. Citing the national transportation policy of 49 U.S.C. 10101(a)(2)(A) and (E), complainants argue that the Commission should reverse its prior decision and require UPS to transport common fireworks

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[2] Concurrently, Consigned Sales Company, Inc., Seasonal Merchandise, Inc., San Diego Fireworks, Inc., and Wisconsin Fireworks Association jointly with Indiana Fireworks Distributors Association, Inc., and Pennsylvania Pyrotechnics Association, seek leave to intervene. UPS vigorously opposes intervention at this stage. We deny the requests to intervene.

When the Court appeal was pending, the Commission denied similar intervention requests (including those of two of the shippers seeking to intervene now). At this time, the proceeding is closed and has been affirmed on appeal. No reason is given why these parties did not participate in the original proceeding. Moreover, as we are denying the petition to reopen (*see* discussion, *infra*), there is, in a sense, no pending case for which intervention would be available. Finally, those seeking to intervene raise no issues not addressed by petitioners. Thus, nothing material would be added to the record if intervention were permitted.

We also note that the National Industrial Transportation League (NITL) has submitted a reply to the petition to reopen. It does not appear that NITL is a party to this proceeding, nor does it formally seek leave to intervene at this time. Accordingly, the tendered reply will be rejected.

[3] UPS's claim that the petition to reopen conflicts with the reviewing court's jurisdiction is plainly incorrect. This case is no longer pending before the court, which has already ruled on complainants' appeal by affirming the Commission's prior decision. While it certainly is not favored in light of principles of administrative finality, reopening of a proceeding is not foreclosed once a court has ruled finally on an appeal. The Commission retains the power to reopen its proceedings for good cause at any time.

in order to meet the needs of and to provide and maintain service to small shippers (especially small shippers of common fireworks). In support of their position, complainants tender additional verified statements from fireworks shippers and stress particularly the circumstances faced by shipper Olde Glory (one of the original complainants), which states that it finds no known carrier available and willing to provide small-parcel service.[4]

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[4] Complaints have filed various supplemental pleadings in addition to their petition to reopen. They have sought waiver of the Commission's rules to permit the filing of a reply to UPS's reply to their petition to reopen. In the alternative, complainants move to strike portions of UPS's reply that they assert "are patently false and which deliberately twist, distort and misrepresent the meaning and content" of the verified statements submitted in support of the petition to reopen. Complainants argue that UPS has selectively taken portions of the verified statements out of context and has thus distorted their meaning.

The Commission's rules do not permit the filing of a reply to a reply. 49 CFR 1104.13(c). The motion to strike is, in essence, another form of the reply to the reply. Although complainants have followed the proper procedure in seeking leave to file the otherwise unauthorized pleading, and, in the alternative, moving to strike the matter they find objectionable, the Commission is not bound to accept the reply in either form.

The verified statements speak for themselves, and the reply to the reply is nothing more than unauthorized argument by counsel. Moreover, the motion to strike and the reply to the reply seek simply to present complainants' counsel's view of why UPS has mischaracterized the verified statements. The Commission is capable of reading and understanding the statements. Accordingly, no good cause has been shown to permit the reply to the reply to be filed, or to strike anything from UPS's reply. The reply to the reply will be rejected and the motion to strike will be denied.

Additionally, on May 3, 1990, complainants filed a supplemental motion for expedited handling, to which UPS filed a response and motion to strike. Each pleading is supplemental argument, for which good cause to consider has not been shown. Accordingly, both will be rejected.

DISCUSSION

In approving UPS's service cancellation in *UPS II*, the Commission looked at "inordinate operational burdens on the carrier's side, with hardship to the shippers as an offsetting consideration" (897 F.2d at 563). In light of numerous factors, including problems associated with various fireworks shippers' failure to comply with a variety of state and local laws, the Commission found that fireworks service created inordinate operational burdens on UPS. It recognized that the shippers would suffer some hardship with the discontinuance of UPS's service, in the form of higher rates and reduced service levels. But it also noted that the shippers had used numerous other carriers (including but not limited to Federal Express) even when UPS was providing service. Finding that continued (or new) service would be available for many shippers and receivers, the Commission authorized the carrier to discontinue its fireworks service.

The basis for complainants' changed circumstances argument is their allegation that the curtailment of Federal Express's services has aggravated the hardship to the shippers to the point that reopening is justified. In particular, they note that Federal Express[5] published a new rule, effective October 1, 1989, with respect to transporting common fireworks.[6] Claiming that Federal Express will not accept shipments of common fireworks to certain lawful destinations, and that it refuses to provide any service to shipper Olde Glory, either inbound or outbound, complainants maintain that the manner in which Federal Express

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[5] Federal Express is not subject to this Commission's jurisdiction.

[6] The rule reads: "Fireworks will only be accepted with prior written approval from Federal Express. A pre-approved shipper is responsible for ensuring compliance with this requirement by the recipient. The pre-approved shipper is also responsible for complying with all packing requirements and appropriate marking and labeling of the package and compliance with applicable federal, state, and local laws." The principal difference between the new rule and the prior rule is the requirement that the shipper be pre-approved. *See* Appendix F to UPS's reply to the petition to reopen.

has applied its rule has eliminated its service for many fireworks shippers. Relying on shipper testimony, and on selected excerpts from correspondence with Federal Express, complainants state that Federal Express will no longer serve any shippers that have had any shipments returned as undeliverable or that are unable to "certify" to the satisfaction of Federal Express that all its consignees are in compliance with all laws and licensing requirements.

Petitioners' presentation, even viewed in its most favorable light, does not warrant reopening or reversal of *UPS II*. The new Federal Express rule appears to be a reasonable response to a documented problem of compliance with various Federal, state, and local laws – the same problem identified in *UPS II*. Federal Express's heightened attention and concern about its lawful handling of fireworks, and the determination that it apparently made after its increased experience with complainants and other fireworks shippers to be more careful in selecting its customers, confirms UPS's claims about problems associated with fireworks service.

Moreover, complainants' examples do not indicate that Federal Express no longer handles fireworks. Even if Federal Express's availability as a transportation alternative for all fireworks shippers is somewhat more limited than it was before, the carrier still, according to complainants, provides extensive service for many shippers over a wide geographical area. And as we found earlier, the shippers used numerous other motor common carriers even when UPS was providing services. Thus, as the court recognized (897 F.2d at 565), Federal Express may have been the most widely used transportation alternative, but it was not the only alternative transportation service available to these shippers.

Complainants seek to show that lost revenues ought to warrant reopening. But the Commission and the court recognized that some economic hardship would likely result from the

loss of UPS's service, because alternate service would be more expensive, at least initially. The Commission pointed out, however, that shippers could not only use carriers that were available, they could develop new alternatives. Complainants thus have not raised any new evidence or changed circumstances substantially different from what the Commission considered in *UPS II*.

Complainants also argue that the Commission committed material error in finding that UPS's fireworks traffic was cross subsidized by its other traffic. They submit as "new evidence" a verified statement of an economist,[7] who asserts:

> [A] cross-subsidy cannot exist unless the revenues earned from fireworks shippers are less than the incremental costs of serving them. Neither the evidence cited in the Commission's decision nor [other] evidence . . . show[s] that the revenues earned from transporting fireworks are less than the incremental cost incurred. Therefore, this evidence does not provide a sufficient basis for determining the presence of cross-subsidization.

Complainants argue that, since UPS presented no evidence concerning the revenues it earned from transporting common fireworks, the Commission's finding of cross-subsidy is erroneous, both theoretically and factually.

We disagree. The Commission briefly alluded to the term "cross subsidy" in *UPS II* simply to reflect the fact that fireworks service entailed costs that were not entailed in other small package services, and that such costs had to be recovered, if at all, from UPS's general shippers. Complainants' argument that UPS did not make an adequate showing of additional costs, or that it had to "show carrying fireworks was a profitless venture," was rejected by the Commission and the court (897 F.2d at

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[7] Henry B. McFarland, Senior Economist, Economists Incorporated.

564-65).[8] We reject their claim that our earlier decision contained material error.

In summary, the decision in *UPS II* to permit cancellation of fireworks service was not premised solely on the availability of service from Federal Express as a complete substitute for UPS, and the Commission is not constrained by a definition of cross subsidy asserted by complainants' economic witness. Both of these arguments were considered and rejected by the appellate court that affirmed the Commission's prior decision in this case. Under these circumstances, we see no basis for granting the petition to reopen.

It is ordered:

1. The petitions for leave to intervene are denied.

2. The reply to the reply is rejected.

3. The alternative motion to strike is denied.

4. The supplemental motion for expedited handling and the reply to the supplemental motion are rejected.

5. The tendered reply of the National Industrial Transportation League to the petition to reopen is rejected.

6. The petition to reopen this proceeding is denied.

7. This decision is effective on June 18, 1990.

By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, Lamboley, and Emmett. Commissioner Simmons would have reopened this proceeding. Commissioner Laboley dissented with a separate expression.

Noreta R. McGee
Secretary

(SEAL)

[8] Specifically, the Commission found, and the court agreed, that fireworks service was "increasingly difficult and expensive" and was "not only 'dissimilar' [from UPS's typical small package service], but dramatically so." Indeed, "[t]he transportation of fireworks notably hampered the efficient operation of [UPS's entire system]." *Id.*

COMMISSIONER LAMBOLEY, dissenting:

While mindful of the court's affirmation of *UPS II* I believe that reopening should have been granted. I continue to believe that UPS has not effectively shown that transporting fireworks is "economically or operationally impracticable", the standard used to measure and approve limitations on a common carrier's obligation to provide service "on reasonable request" 49 U.S.C. 11101; and *Elimination of Certificates as The Measure of "Holding Out"*, 48 Fed. Reg. 11,136 (1983).

Further, Federal Express' recent tariff action, cast in any reasonable light, will have some restrictive effect for fireworks shippers. Accordingly, the Commission is presented with an opportunity to reconsider the more fundamental and consequential aspect of its previous decision; the real options, if any, available to transport fireworks, and this Commission's role to monitor and potentially ensure access to transportation service.

At this juncture, this case is not one of transportation affordability but is one of transportation availability, not transportation at a price, but at any price.

Appendix D

NO. MC-C-30093

B. J. ALAN CO., ET AL.

V.

UNITED PARCEL SERVICE, INC.
(AN OHIO CORPORATION)
UNITED PARCEL SERVICE, INC.
(A NEW YORK CORPORATION)
AND ROADWAY PACKAGE SYSTEM, INC.

Decided June 30, 1989

On further consideration, findings in the prior report, 4 I.C.C.2d 704, reversed. Challenged tariff provision limiting the service respondents hold out by excluding transportation of common fireworks found not to be unreasonably discriminatory or otherwise unlawful. Complaint dismissed.

BY THE COMMISSION:

In *B. J. Alan Co., et al. v. United Parcel Service, et al.*, 4 I.C.C.2d 704 (1988) (*UPS I*), we ordered respondents United Parcel Service, Inc. (an Ohio corporation), and United Parcel Service, Inc. (a New York corporation) (collectively UPS), to file tariffs reinstating service on common fireworks on the same terms and conditions that existed prior to their cancellation. Respondents filed a petition to reopen the proceeding, and complainants (also referred to as the fireworks shippers) replied.[1] We reopened the proceeding for the receipt of further evidence in *B.J. Alan Co., et al. v. United Parcel Service, et al.*,

[1] B.J. Alan Co., Inc., Olde Glory Marketing Limited, Neptune Fireworks Company, Inc. and Nebraska Fireworks, Inc., were the original complainants. Nebraska Fireworks, Inc. was subsequently dismissed as a complainant for failure to comply with discovery.

served January 18, 1989 (not printed), and both complainants and UPS have submitted further evidence and replies.

We have considered the record, including the additional evidence submitted on reopening, and have concluded that the prior decision on the merits was in error. Accordingly, we will reverse that decision and, for the reasons set forth below, dismiss the complaint.[2]

BACKGROUND

UPS is a nationwide motor carrier system specializing in small package delivery. UPS' package handling practices are designed to produce uniform transportation conditions for each package. This practice of uniform handling is the basis for a simple and efficient system of low cost, small shipment pickup, line-haul, and delivery throughout the country.

On November 24, 1987, UPS filed a supplement to its tariffs, to become effective January 1, 1988, stating that "common fireworks as defined in Department of Transportation Hazardous Materials Regulations, 49 C.F.R. § 173.100(r)," would not be accepted for transportation. Complainants filed a protest against this tariff supplement, requesting suspension and investigation of this item.[3] On December 28, 1987, the

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[2] UPS claims that it was unfair, arbitrary, and capricious to dismiss with prejudice the complaint against respondent Roadway Package System, Inc. (RPS). Although the reasons for complainants' motion to dismiss were not articulated in the prior decision, we note that RPS was not able to comply with the expedited procedural schedule complainants were pursuing at that stage of the case. Rather than delay an early decision on the merits, complainants apparently chose to accept dismissal of the respondent that posed an impediment to that decision. In view of our decision here, UPS' concerns are moot.

[3] Complainants are shippers of "common" fireworks who have come to rely on UPS's small parcel service to distribute their products nationwide. The common fireworks involved in this proceeding are categorized by the Department of Transportation (DOT) as Class C commodities. Thus, they must be transported in small parcels. This proceeding does not involve more

Commission's Suspension Board declined to suspend or to investigate. On December 31, 1987, the Commission upheld the Suspension Board's decision. Accordingly, the challenged tariff item became effective and UPS began to operate under its provisions. Complainants then filed this complaint, which was upheld in*UPS I, supra*.

In *B.J. Alan Co., et al. v. United Parcel Service, et al*, served January 18, 1989, (not printed), we permitted the Association of American Railroads to intervene, and set a procedural schedule for the parties to submit additional evidence. We specifically requested that the parties submit additional evidence concerning: (1) the range of service options available to fireworks shippers; (2) the extent to which UPS service is more convenient for these shippers; and (3) the additional costs to UPS associated with the transportation of fireworks shipments compared to other types of small shipments handled by this carrier. As these three matters are related, we will discuss them together.

UPS contends that complainants have access to numerous other motor carriers and have voluntarily used other carriers, even when UPS service was available. Principally, UPS notes, Federal Express provided service to transport common fireworks during the season that UPS did not provide that service. The Federal Express service was prominently advertised by one fireworks shipper, and others have used not only Federal Express but several other carriers as well. Many member carriers of National Film Carriers, Inc., offer package service, unrestricted as to common fireworks, and such regional carriers as the Tex-Pack carriers provide an additional, alternative service. Accordingly, UPS argues, the transportation marketplace has and can continue to provide service to these shippers.

UPS asserts that most of the alternative carriers (including Federal Express and other carriers that handle shipments of common fireworks weighing as little as eight pounds) offer

pick-up and delivery services comparable to those of UPS. The U.S. Postal Service, however, does not handle common fireworks in parcel post. UPS argues that it is "incredibly unjust and unfair" that the previous action of this agency in requiring UPS to resume its common fireworks service is contrary to other long-standing government restrictions against carrying common fireworks.

UPS also defends its action on the ground that its additional costs in transporting common fireworks far exceed those in transporting any other Class C commodities. It points out that these costs are unique to the movement of common fireworks, which are the only Class C commodities widely distributed by mail order in enormous volumes during a compressed time frame.

These costs include compliance with diverse and non-uniform State and local regulations governing possession and delivery of fireworks. UPS finds it impossible to discern prior to shipment whether the shipper has complied with applicable State and local requirements. It submits statements of several law enforcement officials and fire marshals complaining of illegal shipments of fireworks into their individual jurisdictions. UPS estimates its annual costs in researching and reviewing such local requirements to be $52,000 for maintaining and updating files and materials covering State and local regulations, $5,000 for visits to shippers to review problems, and $25,000 for clerical and related office expenses. It argues that these costs are incurred because the fireworks shippers have failed to take responsibility for complying with these State and local laws. UPS has considered developing a specialized computer system to keep track of the various local restrictions that apply to fireworks deliveries, but it has determined that such a system, while costing millions of dollars, would track only a small volume of shipments during a limited season and still would not

achieve a degree of accuracy high enough to ensure proper compliance.

Large volumes of common fireworks are tendered for shipment during a short season preceding the July 4th holiday. To show operational problems and other added costs attributable to this traffic, UPS illustrates the problems it experienced at just one of its terminals in 1987. The volume of fireworks traffic requires special efforts to monitor the quantity of fireworks loaded onto each vehicle. Since DOT regulations require that a vehicle carry warning placards if it carries 1,000 pounds or more of Class C fireworks, UPS must monitor the cumulative total weight of fireworks it places in each vehicle during the peak season and either place a placard on the vehicle (which it prefers not to do) or divert additional fireworks packages to other vehicles. The time and delays caused by these monitoring efforts in June 1987 adversely affected all other packages moving through that terminal. Monitoring these fireworks shipments accounted for 54% of the conveyor belt-shut-downs during that month, delaying the processing of all traffic while fireworks quantities were calculated and packages manually set aside to avoid exceeding the vehicle weight limits. As a consequence, the terminal's productivity for the month decreased by almost 10%.

UPS finds this to be a highly unsatisfactory operating procedure, attributable solely to common fireworks traffic, since no other industry distributes such enormous volumes of Class C commodities by mail order in such a short period of time. It estimates that these special efforts create extra costs of $135,000 per year.

UPS asserts that transporting common fireworks also creates other operational problems and leads to serious legal proceedings. UPS' facilities have been inspected and fireworks seized in several States. It also has been exposed to potential civil liability for damages resulting from the use of illegally

shipped fireworks, assertedly avoiding liability in one case only because it had not, in fact, transported the fireworks involved.

UPS also maintains that common fireworks account for an unusually large number of uncompensated package returns. Some of the complainant shippers have consistently tendered fireworks shipments to destinations where their delivery is illegal or where proper permits have not been secured. UPS has been forced to conduct special audits and to return over 2,000 packages to shipper B.J. Alan alone during 1987. In addition to the personnel cost associated with conducting these special audits, UPS estimates its costs of returning excess numbers of fireworks packages as $21,824 per year. It associates additional costs with adverse media coverage and publicity.

In summary, UPS asserts that it has "struggled mightily" with the problems it has described, but that transporting common fireworks has proven to be very disruptive to its operations. The key to its operating method is uniformity and simplicity to achieve operating efficiencies the public has come to expect from it. The handling of common fireworks, however, slows this system and sometimes brings it to a halt, jeopardizing UPS' service commitment to other traffic. It argues that the special services that common fireworks require are not compatible with the high volume, low cost, generic package delivery system that it operates.

Reduced to its essentials, the fireworks shippers' grievance is that alternative service is more costly and more complex. Most trucking companies impose minimum charges of $35 to $50 per parcel, and additional fees for residential delivery. Only Federal Express presented a possibility of reliable shipping, yet even its rates were considered too high for most customers, and it does not serve many rural areas. Smaller shippers have depended on the automatic pick-up service provided by UPS, rather than taking their parcels to the terminals of other carriers. Two of the shippers who assertedly sell only to retailers solicited

a voluminous number of form responses from their customers, urging the Commission to require UPS to maintain service transporting common fireworks. Another shipper, which ships only to commercial customers, was forced to expend increased effort to segregate common fireworks from other Class C commodities in the same consignments.

The shippers point out that common fireworks move in small parcels, requiring a specialized service such as that UPS offers in general, but that most truck companies are allegedly not able to provide. They note that, in obtaining operating authorities from this Commission, UPS has repeatedly argued that its small parcel market is one that most carriers consider unattractive. Further, complainants argue that the statutory restriction against the U.S. Postal Service transportation of common fireworks indicates Congressional intent that common fireworks move by common carrier. They further argue that common fireworks are not inherently unsafe and that DOT regulations recognize that they present only a minimum transportation hazard. The shippers also assert that economic barriers to entry make it unlikely that any real nationwide competition to UPS would ever emerge in this market.

Basically, complainants argue that, since there is no feasible alternative to the UPS service, the question is not one of convenience, but of necessity. UPS service includes a number of unique features, including: its specialization in transporting small parcels, such as those in which these common fireworks are shipped; its rate structure, based solely on weight and distance, regardless of the contents of the package; its automatic pick-up service at a flat charge per week, as compared to extra charges assessed by other carriers; its provision of residential deliveries at no extra charge; its use of simplified shipping documents instead of individual bills of lading; and its definite and expeditious transit times.

The shippers argue that they have developed their markets in reliance on the availability of UPS service, even to the point of purchasing specialized metering equipment that automatically calculates the UPS rate for each package. Loss of UPS service, accordingly, would have a traumatic effect on their business operations and sales.

Complainants also present cost arguments based on publicly available information and certain assumptions in a statement of an economics consultant (discussed below) in which they conclude that UPS discriminates against the common fireworks industry without any "normal" reason and abuses its monopoly power by refusing to transport fireworks. Complainants point out that UPS still transports other Class C commodities and similar "regulated products," such as firearms, ammunition, and gun powder, which should present similar legal and regulatory difficulties. They also argue that UPS has made no showing that transporting common fireworks is unprofitable or is different from other commodities. They claim that, since the UPS pricing structure is based on average costs, there is no rational economic reason to single out one cost component as being higher than average. Complainants argue that the described experiences at one UPS terminal may not be assumed to apply equally at other terminals. Overall, they challenge all aspects of UPS' costs presentation.[4]

The consultant's statement asserts that UPS has a dominant, monopoly position in the relevant market: the nation-

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dangerous fireworks that either are categorized as Class B explosives or are illegal.

[4] The fireworks shippers object to our denial of discovery. They argue that it prevented them from presenting a cost study based on UPS's actual costs. We denied complainants' appeal when we set the procedural schedule in this matter (including issues regarding further discovery) in No. MC-C-30093, *B.J. Alan Co., Inc., et al v. United Parcel Service, Inc., et al.*, served March 3, 1989, (not printed). No grounds have been presented that persuade us to reconsider the question of discovery at this time.

wide transportation of small parcels of common fireworks. Alternative services, it is claimed, are extremely limited, substantially more costly, and far more difficult to use. The consultant also asserts that the potential for a new entrant into the market is severely limited by natural, artificial, and economic barriers, including existing shipper reliance on UPS and the capital cost associated with entering such a business on a nationwide basis. The consultant alleges that UPS has presented no actual, economically based arguments for abandoning fireworks service, especially since UPS' pricing structure makes no distinction as to the commodity contained in the parcel, and since no data suggest that common fireworks traffic differs in any material respect from other traffic on an incremental or fully embedded cost basis. In particular, the argument is presented that, since common fireworks traffic does not generally coincide with peak Christmas traffic, full cost data could support the conclusion that the common fireworks traffic actually provides a relatively steady, economically beneficial "baseload" of traffic for UPS.

In response to the presentation made by complainants' economic consultant, UPS presented a statement by its own consultant. This consultant notes that complainants' monopoly argument presents the anomalous position of striving to preserve, rather than to eliminate or to prevent, the alleged monopoly it identifies. He notes that to define common fireworks transportation as a separate market is to acknowledge the difference from the general transportation of small parcels, and that UPS' withdrawal from that market would not deter potential newcomers in the market as defined.

With regard to the fire marshals' affidavits, complainants claim that it is not within the jurisdictional scope of this proceeding to determine whether the common fireworks industry should exist or be permitted to do business. They point out that many of the assertions made by the fire marshals relate to illegal

fireworks and Class B fireworks – not to the Class C common fireworks involved in this proceeding. The shippers assert that these common fireworks are not the source or cause of the dangers the fire marshals describe, so that it is improper and irrelevant to link such concerns to this proceeding. They also contest various specific allegations that particular shippers may not legally ship common fireworks into certain States, object to references to dangers having nothing to do with the transportation of common fireworks, and they dispute interpretations as to the legality of common fireworks sales in particular areas. Complainants charge that the fire marshals are pursuing a political agenda that would ban public use of fire-works – an agenda for which this Commission is not an appropriate forum. They also allege that a common carrier is not subject to criminal or civil liability for interstate transportation of common fireworks.

Finally, complainants contend that UPS' decision to stop transporting common fireworks was actually based on public relations concerns for the carrier's image, and that both UPS and the complaining shippers have in fact been victimized by harassing tactics of overzealous fire marshals and by sensationalist media attention.

Both sides have also presented legal and policy arguments in support of their positions. UPS argues that the prior decision on the merits should be reversed because the common carrier obligation of a motor carrier is not absolute, especially where alternative services are available and costs uniquely associated with the subject traffic impose an undue operational burden on the carrier. It asserts that the prior decision reversed longstanding precedent without plausible explanations, in a manner inconsistent with the applicable statute and the facts of the case. In particular, it views that decision as creating an entirely new and unprecedent standard of service discrimination, contrary to the reliance on open, vigorous competition of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) (MCA).

This, it contends, has no basis in fact or law, since the lack of a finding of a violation of the common carrier obligation precludes, as a matter of law, any holding that the carrier has violated the statutory proscription against discrimination. It notes specifically that the challenged tariff item cannot be discriminatory, since it treats all fireworks shippers the same, and because there has been no violation of the essential-elements of discrimination under the statute: (1) a disparity of rates; (2) actual or potential competitive injury to the complaining party; (3) control of both rates by the same carriers; and (4) an absence of differences in transportation conditions that would justify the rate disparity. *See, e.g., Harborlite Corp. v. Southern Pac. Transp. Co.*, 364 I.C.C. 585, 586 (1981) (*Harborlite*).

Overall, UPS characterized complainants' efforts to maximize profits at UPS' expense as being irresponsible. It denies that it transports any Class A or B explosives and notes that the other hazardous commodities it transports move only between licensed dealers holding valid permits.[5] It denies any cost relationship between its general peak traffic period in December and the movement of common fireworks in May and June. It also denies that it holds any inherent monopoly position, noting the irony in the fact that it is seeking to surrender whatever market power it may hold over fireworks transportation. It further observes that complainants submitted no financial statements to show the volume of lost profits and business during the period when UPS service was not available to them. UPS

[5] Black powder and smokeless powder, which are Class A and B (respectively) explosives in some circumstances, are accepted only when packaged to qualify as a flammable solid under DOT regulations. Moreover, compliance with DOT's regulations is undertaken by the shipper, under DOT approval. Shippers of these commodities, UPS asserts, are more sensitive and responsive to the transportation problems their commodities present than are shippers of common fireworks. With regard to firearms and ammunition, UPS transports firearms only between *licensed* importers, manufacturers, dealers, and collectors, and neither commodity is subject to the patchwork of local laws and regulations that apply to fireworks.

further notes that there was assertedly no shortage of fireworks at that time.

Complainants argue that the common carrier obligation was not obliterated by the MCA and that certain provisions of that Act relate specifically to the common carrier obligation. They also argue that 49 U.S.C. §10741(b) does properly apply, inasmuch as it prohibits unreasonable discrimination against a type of traffic as well as rate differentials. They assert that UPS's challenged tariff constitutes an unreasonable and unlawful practice.

DISCUSSION AND CONCLUSIONS

In the prior decision, we found that UPS's decision not to transport common fireworks constituted unreasonable discrimination prohibited by 49 U.S.C. §10741(b), because it was not justified by a showing of different transportation conditions. Upon further consideration of the law and the record, including the additional evidence and argument submitted by the parties on reopening, we conclude that the prior findings were in error. Accordingly, we reverse and, for the reasons discussed below, now find that the challenged tariff item does not constitute unreasonable discrimination and is not otherwise unlawful.

A. *Unreasonable Discrimination.* As noted in the prior decision, the established test used in rate cases for determining whether unreasonable discrimination exists depends upon four elements: (1) a disparity of rates; (2) actual or potential competitive injury to the complaining party; (3) control of both the lower and higher rates; and (4) an absence of differences in transportation conditions that would justify the rate disparity.[6] *Harborlite, supra.* Complaining parties have the burden of proving the presence of the first three elements. The burden then shifts to the defendant carriers to justify the disparity. *See also H. Samuels Co., Inc. v. Atchison, T. & S. F. Ry. Co.*, 364 I.C.C.

[6] The test is framed in the context of rate levels because this is the context in which the issue has typically arisen.

280 (1980); *Chicago & Eastern Illinois R. Co. v. United States*, 384 F.Supp. 298 (N.D. Ill. 1974), *aff'd mem.*, 421 U.S. 956 (1975); and *Big River Industries, Inc. v. Aberdeen & R. R. Co.*, 329 I.C.C. 539 (1967).

The prior decision relied upon the statutory language of 49 U.S.C. §10741(b), prohibiting common carriers from subjecting a person, place, port, or *type of traffic* to unreasonable discrimination, and concluded in substance that UPS' reduction in service constituted unreasonable discrimination against a type of traffic.[7] We are persuaded now that our prior determination to assess this case under traditional rate discrimination criteria was incorrect.

The antidiscrimination provisions of §10741(b) embody the recodification, from the original Interstate Commerce Act, of the provisions of sections 2 (prohibiting special rates and rebates) and 3(1) and 216(d) (prohibiting undue or unreasonable preference or prejudice). But former section 2, by its terms, is inapplicable to the situation at hand. It prohibited every common carrier from receiving "greater or less compensation for any service * * * than it * * * receives from any other person * * * for * * * a like and contemporaneous service * * * under substantially similar circumstances and conditions." It clearly applied only to carrier rate levels, and in any event permitted relief only for rate differences involving "like traffic" and "substantially similar [transportation] circumstances and conditions." This case does not involve the rate levels that UPS proposes, but rather involves whether it will provide service

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[7] The prior decision, relying on *Harborlite, supra*, found that: (1) there was a disparity in the level of service provided fireworks shippers (none) and that provided other small package shippers; (2) the higher rates that the fireworks shippers would have to pay to use other carriers would harm them competitively by reducing fireworks sales; (3) UPS controlled the levels of service provided to fireworks shippers and other small package shippers; and (4) the difference in service was not justified by transportation conditions. *UPS I*, at 709-712.

(and charge any rates at all). Moreover, even if the principles of former section 2 were applicable, UPS has clearly demonstrated in this proceeding that the transportation conditions associated with fireworks shipments are very dissimilar from those associated with small packages generally.[8]

Former sections 3(1) and 216(d), by their terms, do not limit relief to situations involving different rate levels. Those provisions made it unlawful for any common carrier to "give * * * any undue or unreasonable preference or advantage to any * * * particular description of traffic, in any respect whatsoever[,] or to subject any particular * * * description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *." The old preference and prejudice cases, however, required a showing that the preferred and prejudice commodities (or localities, shippers, and so forth) competed with each other,[9] and additionally that any injury be suffered as a direct competitive result of the complained-of

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[8] Indeed, the bedrock factual assumption underlying *UPS I, supra*, with which we entirely disagree, was that the small package market is essentially undifferentiated. As we discuss in more detail later, it is plain to us that common fireworks present transportation problems to UPS that are markedly different from those associated with other small packages that UPS handles. The fact that historically complainants have been afforded access to UPS' small package service does not establish that fireworks and other small packages have similar transportation characteristics. UPS has shown that substantial extra handling and extra costs are associated with carrying common fireworks in a system that derives its strength from the ability to ignore the contents of the package and treat all packages alike. UPS has also shown that diverse legal requirements, to which complainants are apparently unwilling or unable to conform, occasion extraordinary expense and attention when common fireworks are transported. The evidence simply will not support a finding that fireworks are the same, for transportation purposes, as all other small packages.

[9] *See, e.g., California Walnut Growers Assoc. v. Aberdeen & Rockfish R. Co.*, 50 I.C.C. 558, 568 (1918); *Boston Wool Trade Assoc. v. Boston & Albany R. Co.*, 78 I.C.C. 178, 183 (1923).

activity.[10] Here, complainants have not shown, or even alleged, that they compete in the marketplace with small package shippers of other commodities. They cannot avail themselves of the prejudice and preference analysis of old section 216(d).

Thus, in our view the most fundamental flaw in *UPS I* was its treatment of this case as a traditional discrimination case, and, based on the foregoing discussion we reverse the prior finding of unlawful discrimination under §10741. The case does involve discrimination issues of a sort, in the sense that one group of shippers is being treated differently from others. But generally, in assessing refusal-to-serve cases, we look at whether a motor common carrier seeking through a tariff or other means to discontinue or limit service for a particular class of traffic has violated (or, viewed another way, can escape from) the common carrier obligation that it assumed when it first obtained its license.[11] We now turn to that issue.

B. *Common Carrier Obligation.* The Interstate Commerce Act, 49 U.S.C. §11101, requires that a common carrier providing service subject to the Commission's jurisdiction shall provide such service upon reasonable request. Common law has long recognized the principle that a common carrier owes a duty to the public to carry for all to the extent of its capacity at a reasonable charge and with substantial impartiality according to its holding out. *See Michigan Pub. Util. Comm'n v. Duke*, 266

[10] *See, e.g., Staley Manufacturing Co. v. Wabash R. Co.*, 167 I.C.C. 12, 15 (1930)("[U]ndue prejudice does not exist merely because rates are different and there is some competition between commodities. There must be a further showing that the difference has operated to complainant's disadvantage in marketing its commodity. [Citation omitted.] The character or intensity of the competition, [and] the specific effect of the rate relationship upon such competition * * * must be shown in addition to a difference in the rates.").

[11] We are aware of various old cases characterizing refusals to serve as "service discrimination" cases, but as the prior decision recognized, those cases, while they do involve discrimination in a generic sense, really revolved around common carrier obligation principles. *UPS I*, at 708.

U.S. 570, 577 (1925). This principle was incorporated into the Interstate Commerce Act when it was first enacted, and it is the foundation of the requirement now contained in §11101 that common carriers provide service upon reasonable request.

The older railroad cases reflect a keen awareness of the valuable, exclusive franchises conferred upon that industry, and as a result early court and Commission decisions rather rigorously construed the obligation of a railroad to provide service. But even in the earliest rail cases, the obligation to provide service was not held to be absolute, but rather was qualified by a rule of reason that excused carriers from service failures that were reasonable under the prevailing circumstances. Thus, in *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 133 (1914), the Supreme Court, in assessing whether a carrier that was alleged to have been remiss in providing service to a shipper because of an increased demand for its services had breached this common law duty, held:

The common law of old in requiring the carrier to receive all goods and passengers recognized that 'if his coach be full' he was not liable for failing to transport more than he could carry * * *. [T]he law exacts only what is reasonable from such carriers - but, at the same time, requires that they should be equally reasonable in the treatment of their patrons.[12]

As we have noted, the determination of what level of service is reasonable under the prevailing circumstances can vary depending on what the prevailing circumstances are. During the early days of motor carrier regulation, the grant of authority in a certificate was generally confined to the limited service a carrier actually proposed to operate immediately, which was coextensive with that for which the Commission found a public need. As a result, the common law concept of

[12] The Commission similarly recognized that the common carrier obligation was not absolute in early motor cases such as *Montgomery Ward & Co., Inc. v. Consolidated Freightways*, 42 M.C.C. 225, 231 (1943).

the common carrier's holding out – what the Commission construed as reasonable service by motor common carriers operating under Commission regulation – grew to be associated with the operations authorized in their certificates. The Commission confirmed this understanding of the common carrier obligation as recently as 1970 in *Restrictions on Service by Motor Common Carriers*, 111 M.C.C. 151 (*Restrictions*), in which the agency declared that tariff restrictions that limited service to less than that authorized in a carrier's certificate were illegal. *Restrictions* was cited as recently as 1975 for the proposition that carriers cannot restrict their holding out through tariff publication. *Travenol Laboratories, Inc., Petition for Invest.*, 121 M.C.C. 588, 614. This strict approach in the motor carrier field reflected the Commission's interpretation at the time that the objectives of the 1935 motor carrier legislation were to promote stability through strictly regulated entry and price controls. In exchange for their franchises, the carriers were expected to provide reasonable continuous and adequate service over the entire area covered by their certificates.[13]

During the 1970's, however, the Commission changed its regulatory approach to motor carrier regulation and relaxed its regulation of entry. Its view that relaxed entry and increased competition would result in a more efficient and economical motor carrier industry was expressly adopted by Congress in the Motor Carrier Act of 1980. *See* 49 U.S.C. § 10101(a)(2); H.R. Rep. No. 1069, 96th Cong., 2d Sess. 14. As a result of the sharp increase in the competitiveness of the motor carrier industry (thousands of new carriers were licensed, and rate regulation was relaxed), the Commission proposed early in 1981 to eliminate reliance on a carrier's license as the measure of its holding out, and instead permit carriers to use other methods,

[13] Thus the application process became one in which carriers typically sought narrowly circumscribed authorities in order to minimize protests and successfully prosecute their applications at the lowest possible cost, and it also resulted in licenses that were narrowly tailored to the services that a carrier would actually provide.

such as tariff publications or less formal declarations, to announce the services that they hold out.[14] Our purpose in initiating that proceeding was to reconcile our interpretation of the common carrier obligation with our policy of encouraging carriers to seek broad licenses (thus encouraging competition and minimizing entry costs).

While the rulemaking was in progress, however, the United States Court of Appeals for the Fifth Circuit issued a decision addressing the relationship between a carrier's certificate and the scope of its holding out. After reviewing the old common carrier obligation cases, the court held that "[a] common carrier is free to carve out as large or as small a [niche] as it feels appropriate * * *. [T]here is no requirement that the carrier be able, quantitatively, to perform all or any substantial part of the transportation in all covered areas [of the certificate]". *Steere Tank Lines, Inc. v. ICC*, 675 F.2d 103, 105 (5th Cir. 1982), citing *Michigan Pub. Util. Comm'n v. Duke*. In light of that holding, we decided that there was no need to continue our rulemaking proceeding looking toward amending our existing regulations concerning the scope of a carrier's holding out. Instead, we "embrace[d the Fifth Circuit's] judicial pronouncement as a statement of Commission policy," and declared that a "common carrier is not in violation of its obligations if it declines to provide service within the scope of its operating authority because such service is economically or operationally impracticable in the circumstances at the time of the service request." *Elimination of Certificates As the Measure of "Holding Out"*, 48 Fed. Reg. 11,136 (1983) (*Elimination*).

Our intent in embracing the *Steere* holding as a statement of Commission policy was to clarify that we would look at

[14] *See Elimination of Certificates As the Measure of "Holding Out"*, 46 Fed. Reg. 8604, Jan. 27, 1981, as amended at 46 Fed. Reg. 13,751 (1981). *See also* the Commission's observation in *Consolidated Frtwys. Corp. of Del. Ext. – United States*, 132 M.C.C. 458, 463 (1981), that reduced entry barriers and emphasis on competition permit a "more relaxed common carrier obligation."

common carrier obligation issues in light of our overall regulatory policy and the prevailing competitive climate in the transportation industry. There was no suggestion in *Steere, supra,* of limiting a carrier to choosing the scope of service it will offer only at the time it begins to operate, or restricting a carrier's right to reduce that scope as time passes. For example, a carrier is equally free to add specialized equipment to its fleet in order to handle particular commodities within the scope of its authority, or to determine that maintaining such specialized equipment is not cost-effective and, accordingly, to dispose of that equipment and to terminate its participation in transporting those commodities. And *Elimination, supra,* speaks clearly in terms of circumstances *at the time* service is requested. Such circumstances may change according to the carrier's assessment of the marketplace and its resources, as well as external events beyond its control. Among these circumstances is the regulatory environment. In other words, the obligation to serve, of necessity, can and does change to reflect the commercial realities of the transportation marketplace and the attending scheme of regulation.

Thus, although UPS obtained its licenses before the announcement of our policy in 1983, because it provides and its shippers receive service in the context of today's transportation environment, our focus must be on whether complainants have shown that the service limitation UPS would implement through the challenged tariff item is unreasonable, *i.e.,* is not "economically or operationally impracticable."[15] Based on the evidence presented, complainants have not so established.

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[15] The word "impracticable" in a literal sense means that something is not capable of being carried out. But, the preceding discussion makes it quite clear that our intent in the *Elimination* case was not to erect a standard of "impossibility" in assessing carrier service in light of the common carrier obligation. Rather, our intent was and is simply to assess whether a carrier's service determinations are reasonable under the prevailing circumstances, including the prevailing transportation conditions.

It is apparent that UPS carefully considered the circumstances attendant to transporting common fireworks in concluding, *inter alia*: (1) that it has become increasingly difficult and expensive to comply with the proliferation of non-uniform State and municipal regulations governing fireworks; (2) that transporting common fireworks is operationally impractical in the scheme of its overall business plan; and (3) that it is economically impractical and injurious to its public image to be subjected to defending itself against adverse publicity and possible lawsuits stemming from the use of common fireworks it has delivered.

UPS submitted a thorough compilation of State and local laws and regulations governing the transportation, sale, possession, and use of fireworks. It has documented numerous and repeated instances in which it has had to return shipments because delivery would have been unlawful. We agree with UPS's contention that it is obligated to comply with these various laws and regulations. We are not persuaded by complainants' arguments to the contrary based on cases concerning the transportation of alcoholic liquors that date from years preceding both the enactment and repeal of the 18th Amendment to the U.S. Constitution. *See, e.g., Cohen v. Bredehoeft,* 290 F. Supp. 1001 (S.D. Tex. 1968),*aff'd402 F.2d 61 (5th Cir. 1968),cert. denied,* 393 U.S. 1086.(1969).

The operational impracticality for UPS of common fireworks transportation arises both from the need to comply with State and local regulations and from safety regulations administered by DOT. Shipments tendered to "illegal" points must be identified and returned. If 1,000 pounds or more of Class C fireworks are to be loaded onto a vehicle, the carrier must be able to identify that vehicle with an appropriate warning placard, or it must divert part of the load to a different vehicle. In each instance, special effort, handling, and expense are necessary.

UPS' mode of operations as a high volume, small package carrier is not designed to include such specialized actions, directed to one particular market segment and its rate structure correspondingly does not contemplate transporting traffic requiring any special treatment. In this context, transporting common fireworks obliges UPS to make many extra and unusual efforts in addition to the problems created by the varied State and local laws. For example, UPS is required: (1) to keep track of what shipments contain fireworks (although its operations and rate structure generally are without regard to the commodity shipped); (2) to calculate the weight of fireworks shipments being loaded onto each vehicle, which requires immediate attention by supervisory personnel; and (3) to shut down automated loading belts in order to divert or delay excess fireworks shipments, which delays other shipments, hampers productivity, and causes overtime expense. We are not persuaded that UPS should be obligated, against its will, to undertake all of these extraordinary measures,[16] nor that UPS' basic service to the public should be hampered by having to do so.

UPS also considered the need to defend itself in damage suits arising from the use of common fireworks it delivered, and the possibility of prosecution for violation of the various State and local laws governing fireworks. The former has two aspects,*i.e.*, whether UPS is actually held liable for any damages in any such suit, and the cost of its legal defense. Both are costs (actual or potential) that UPS must ultimately assume under its general rate structure. To require UPS to subject itself to State and local sanctions as a consequence of shipping common fireworks to localities where delivery is illegal is unreasonable.

Common fireworks traffic is a relatively small portion of UPS' overall small package market, which has heretofore benefited from "piggybacking" on the distribution network UPS

[16] This is particularly so in light of the fact that USPS, UPS' chief competition on other traffic, does not incur these extra costs and responsibilities because it is not permitted to handle fireworks.

has developed for ordinary small parcel traffic. UPS is no longer able to ignore the costly and disruptive effects common fireworks impose on its small package delivery system. UPS has quantified the cost of revamping its system to try to carry common fireworks in a lawful, non-disruptive manner. The costs are great, and would not guarantee a smooth integration of common fireworks into its current service patterns. Moreover, absorption of these costs would require either cross-subsidy by its other small package shippers or elimination of one of UPS' fundamental offerings—its uniform rate structure. We conclude that common fireworks require so much special attention as to justify UPS' decision.

We are mindful that complainants may suffer some economic hardship with the loss of UPS service. But, in this regard, we note, as we have previously observed, that complainants submitted no financial statements to show the volume of lost profits and business when UPS service was not available to them. Further, other service, such as that of Federal Express, is available and has been used and even prominently advertised. In sum, as we previously have observed, the complaint here is not that competing services are unavailable, but, simply, that competing services may be more costly for the complaining shippers to use or not as simple as dealing with only one nation-wide carrier.[17] However, this fact does not entitle com-

[17] The fact that the services of other carriers are more costly than those of UPS is a demonstrable reflection of the economic and operational impracticalities surrounding the transportation of common fireworks that UPS itself has experienced. There is no justification under the MCA for requiring UPS to subsidize, at the expense of its other customers, the higher costs attendant to transporting one type of traffic. If, as a result of UPS' actions, complainants now are required to assume the full costs generated by the transportation of their traffic, this is a natural product of the transportation marketplace. The national transportation policy of 49 U.S.C. §10101 does not require any carrier or any other shipper to absorb these types of costs. While there could be an exception in special circumstances (*i.e.*, those in which commodities that must move for health, safety, or national security

plainants to relief nor does it mean that UPS must continue its holding out of service to common fireworks shippers.

UPS has justified its actions from the standpoint of its own operations. Viewing UPS' action in light of overall regulatory policy and the prevailing competitive climate in the transportation industry (*i.e.*, our common carrier obligation policy), we also find UPS' action lawful. Entry of new carriers into this market is relatively free of ICC regulatory barriers. And, the prevailing competitive climate suggests no inherent structural barrier to new service or expansion of existing service. That other service may be more expensive or less convenient is not a compelling reason to require UPS in the circumstances to continue to serve these shippers. As noted, post MCA policy strongly disfavors the cross-subsidy existing now. UPS developed its publicly praised service over time; it was not created overnight.

Complainants are not without options. They may work with existing or new carriers to develop new arrangements. Indeed, complainants could establish their own "house" carrier to serve all common fireworks shippers. Just as the MCA has increased carrier flexibility, it has increased shipping possibilities. The development of new alternatives may require complainants to pay the real costs of service to them, but that is no reason to continue to burden UPS with this traffic.

Finally, we are issuing our decision and making it effective to avoid interfering with the July 4th shipping season. We recognize that complainants made substantial commitments for this shipping season. Also, this action will give complainants a full year to develop alternate transportation in advance of their busiest season.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

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reasons can move by only one carrier or one mode), we need not reach this issue as it clearly is inapplicable here.

It is ordered:

1. The complaint is dismissed.

2. This decision is effective August 20, 1989.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Commissioner Phillips commented with a separate expression. Vice Chairman Simmons and Commissioner Lamboley dissented with separate expressions.

Noreta R. McGee
Secretary

(SEAL)

COMMISSIONER PHILLIPS, commenting:

In my separate expression to the Commission's decision served January 18, 1989, in this case, in which the Commission granted the petition of United Parcel Service (UPS) to reopen and that of the Association of American Railroads (AAR) for leave to intervene, I stated my belief that the Commission has a responsibility to ensure that shippers have reasonable transportation service available to them. I continue to believe the Commission has this responsibility. Nevertheless, I do not believe the Commission's decision served July 12, 1988, which required UPS to reinstate service for common fireworks, was well-grounded in fact or consistent with the requirements of the statute.

The Commission's July 1988 decision centered upon the finding that UPS' decision to cease transportation of common fireworks constituted unreasonable discrimination, which is prohibited by 49 U.S.C. § 10741(b). That provision prohibits an ICC-regulated common carrier from subjecting a person, place, port, or type of traffic to unreasonable discrimination. The decision identified the four-part test used to determine

(generally with respect to rates) whether unreasonable discrimination exists and attempted to apply this test to UPS' decision to cease transportation of common fireworks. The Commission found that complainants had shown that UPS had violated § 10741(b) in the following manner:

1. UPS had subjected complainants' type of traffic to a service disparity when compared to the traffic of UPS' other customers. UPS had not cancelled service for any of its other small shipments customers including other shippers of Class C explosives.

2. Complainants had established that they would lose sales, have to scale back or eliminate mail-order operations, and forego anticipated growth opportunities without service from UPS.

3. UPS commonly controls service to all its small package shippers but chose to single out fireworks traffic and to discriminate against that traffic.

The July 1988 decision also maintained that UPS had not justified cancelling service based on differences in transportation conditions. Instead, UPS had chosen not to transport fireworks on the basis of inconvenience.

In my view, the fundamental flaw in the July 1988 decision is that the Commission treated this as a discrimination case: by seeking to cease fireworks service totally, UPS treated *all* fireworks shippers alike. Rather, I believe the question is whether UPS has a common carrier obligation to serve fireworks shippers.

Section 11101 of the Interstate Commerce Act requires a common carrier subject to Commission jurisdiction to provide the transportation or service "on reasonable request." Motor common carriers are required to provide "safe and adequate service, equipment and facilities." Section 11101 also gives the Commission authority to prescribe requirements for "con-

tinuous and adequate transportation service provided by motor common carriers" under its jurisdiction. Historically, common carriers have been given considerable discretion as to the quantity and quality of service offered and provided.

It is especially important to examine the common carrier obligation in light of events since enactment of the MCA. The United States Court of Appeals for the Fifth Circuit held in 1982 that there is no requirement that a carrier perform "all or any substantial part" of the transportation in all areas covered by its certificate. Noting this ruling, the Commission in 1983 stated that a "common carrier is not in violation of its obligations if it declines to provide service within the scope of its operating authority because such service is economically or operationally impracticable in the circumstances at the time of the service request." *Elimination of Certificates as the Measure of "Holding Out"*, 48 Fed. Reg. 11,136 (1983).

In my January 1989 separate expression to the Commission's decision, I identified four major issues on which I believe further information was needed. I do not believe complainants have shown adequately in these four areas why UPS should be compelled to provide transportation service for common fireworks.

1. *The range of service options available to fireworks shippers.* As today's decision states, "* * * the fireworks shippers' grievance is that alternative service is more costly and more complex." Complainants have not shown that no viable transportation alternatives exist. In fact, it appears that even when UPS service was available, a reasonable portion of fireworks shipments were transported by carriers other than UPS. Some fireworks companies even advertise transportation of their product by other carriers, such as Federal Express.

2. *The extent to which UPS service is the most convenient for these shippers versus UPS service being the only service*

available. It is clear that complainants find UPS service to be the most convenient. Given that fireworks shipments generally weigh less than 50 pounds and that UPS specializes in the transportation of small packages, this is not surprising. Further, UPS has a simple rate structure, based solely on the weight of the package and its destination, and provides extensive pickup and delivery service. Nevertheless, there are other transportation alternatives available to fireworks shippers. The fact that the service provided by less-than-truckload trucking companies and Federal Express may be more expensive than that of UPS and overall not as convenient is not sufficient to require UPS to continue to provide this service. Neither is it necessary that a carrier have nationwide small package authority. Local and regional carriers, as well as joint-line service for longer movements, can help meet the transportation needs of fireworks shippers. Further, in view of the ease of entry into the motor carrier industry afforded by the MCA, new carriers are free to step in and provide any service lost as a result of UPS' discontinuance of service.

3. *The potential inequity of requiring only UPS to provide transportation service with respect to fireworks if other carriers do not face such a requirement.* Complainants maintain that they pursued their complaint against UPS because UPS had been the sole source of nationwide service for small parcels for fireworks for many years. Yet the fact remains that complainants originally included Roadway Package Service (RPS) in this case and that they asked that RPS be dismissed from the case because they sought quick resolution of this matter. It would be unfair to require UPS to provide this service when carriers providing similar service, such as RPS, are excluded from this requirement and when other carriers are available to provide service to the fireworks shippers.

4. *The additional costs to UPS associated with the transportation of fireworks shipments compared to costs for handling other types of small shipments.* Complainants cite their economic study showing that the cost of transporting a small parcel of common fireworks should be no higher than the cost of transporting any other small parcel of any other commodity. Yet the complainants repeatedly mention the fact that Federal Express raised its special handling charge for hazardous materials—including fireworks—from $5 to $10. This would seem to indicate that there are, in fact, different costs associated with fireworks shipments.

UPS maintains that there are "significant and unique costs" associated with the transportation of common fireworks that they do not encounter in the handling of other commodities, including such items as black powder, smokeless powder, firearms, and ammunition. Neither does UPS encounter with these commodities the same types of difficulties associates with the diverse and frequently changing state and local regulations governing fireworks.

In sum, complainants have shown clearly that UPS' service is convenient and reasonably priced. However, in my view, they have failed to show that they will be unable to ship common fireworks absent UPS service. Further, in light of the commission's historical interpretation of the common carrier obligation, especially since enactment of the MCA, it is not appropriate for the Commission to require UPS to continue to provide this service. Given the level of competition in the motor carrier industry, coupled with the entry standards established by the MCA, I would expect that shippers of common fireworks will continue to be able to find carriers to meet their transportation need.

VICE CHAIRMAN SIMMONS, dissenting:

As I stated in my separate expression in the earlier decision, I believe this case should have been initially decided on the basis of whether UPS' action violated its common carrier obligation. The majority also takes that position. However, I disagree with the majority's evaluation of the evidence and the ultimate conclusion. UPS has the burden of proof on reopening in persuading the Commission that we committed some material error or that changed circumstances exist. I do not believe UPS has met this burden. The carrier provided no new or enlightening evidence. It simply provided us with a rehash and update of the previous evidence. In addition, the carrier provided the commission with statements by local sheriffs and officials which have no bearing on the transportation issues involved here, such as whether local laws present some transportation or operational difficulties in transporting small package fireworks. Nor does UPS allege that these local laws preempt federal rules regarding the packaging and handling of fireworks. Even the evidence submitted in response to specific questions raised by Commissioner Phillips was not very illuminating. For instance, while it indicates that there are additional costs in transporting this commodity, UPS did not state whether such costs are unrecoverable or are far beyond those associated with other special commodities requiring additional costs such as firearms, breakable objects or special drugs.

As I see it, the crux of the matter is that UPS does not wish to be associated with fireworks' growing negative reputation. It does not wish to place the placard warning on some of its trucks as required by DOT. This is the reason for all the negative statements about fireworks and fireworks operators submitted by sheriffs and local officials. While a firm's reputation with the public is a legitimate business concern, when the firm involved is a carrier licensed by the Federal government, the carrier has a common carrier obligation. In determining the scope of the common carrier obligation, we must consider whether the service is "economically or operationally imprac-

ticable." *Elimination of Certificates As the Measure of Holding Out*, 48 Fed. Reg. 11,136, 11,137 (1983). Therefore, the sole test for determining if a violation of that obligation has been committed should be whether the transportation of fireworks is beyond the capacity of UPS facilities, or operationally or economically impracticable. The negative "reputation" of a commodity should not be considered.

It is here where the majority accepts UPS' unpersuasive evidence. In my weighing of the evidence, I find that UPS has failed to meet its burden of proof. A common carrier need not be able to serve all to the extent of its authority, but it does have a duty to reasonably serve all to the extent it is able. *Steere Tank Lines, v. I.C.C.*, 675 F.2d 103, 105 (1982). On the basis of the evidence submitted on reopening, UPS has failed to show that, due to operational or economical difficulties, it is unable to transport fireworks.

First, I do not see the added administrative expenses in transporting fireworks to be so onerous as to create economical or operational problems. Nor are these expenses an unreasonable burden. These expenses occur only over a short period of time during the year. Moreover, UPS has not shown that these added costs are not recoverable. It has not satisfactorily demonstrated that whatever extra time and effort go into preparing the paperwork and transporting the fireworks cause significant delays and interference in the shipping of other packages. The carrier has offered no evidence that it has suffered adverse liability claims arising out of its fireworks operations. What is more, UPS does not maintain that it has problems with its own insurance carrier as a result of its transportation of fireworks.

Secondly, I am not persuaded that various local laws or regulations pose the difficulties asserted by UPS. The carrier does not describe how these local laws affect or inhibit the transportation aspect itself. Local laws may affect the use of

fireworks by the ultimate consumer, but they should not dictate the form of transportation across state lines so long as the fireworks are packaged and transported according to Federal specifications. Accordingly, local laws should have no bearing on our deliberations.

Furthermore, I find that UPS has not shown that shippers of fireworks in small packages have found feasible alternatives to its service. The financial losses suffered by these shippers during the time UPS did not offer service lend support to this finding. Common sense dictates that rather than not have the traffic move, these shippers would have diligently sought feasible transportation alternatives. Yet statements submitted by various shippers make clear that business declined precipitously over the previous year.

Complainants documented the unreliability of LTL carriers. Most LTL carriers require minimum volumes or shipments weighing in excess of 200 pounds. The shippers here transport small packages weighing less than 12 or 13 pounds. It is a given fact that LTL carriers simply do not specialize in this type of service. Few, if any, deliver to residential areas. Moreover, the costs to consumers far exceeded the transportation costs of UPS.

Nor does Federal Express offer a feasible alternative. Its price and inability to serve all areas, particularly rural areas and small towns, hamper its capability to provide viable service. Federal Express does not provide simplified documentation or automatic pickup of a nominal fee. Also, Federal Express does not accept c.o.d. shipments, a vital service to some shippers.

In short, UPS has not demonstrated the existence of viable alternatives to its unique features: specialized service for small parcels; unique rate structure; automatic pickup service at a weekly flat charge; pickup and delivery at the premises of the shipper and consignee; simplified shipping documents; and

definite transit time. All these unique services are tailored to the needs of shippers of common fireworks in small packages.

In addition, UPS has failed to rebut previous internal studies conducted by its own staff that alternative service is not available for small parcel shipments of fireworks, particularly to rural areas and small towns. These studies indicate that while transportation of fireworks will continue in interstate commerce, only large shippers, transporting large volumes by way of LTL carriers, will have the capability of selling their product. Because there are currently no viable alternative transportation services for shippers of fireworks weighing 12 and 13 pounds, one can reasonably expect that their products will not move as before. Alas, the promise that small shippers, small towns and rural areas will benefit from the flexibility and increased competition of the 1980 Motor Carrier Act will prove to be elusive for these shippers.

I also cannot join in the majority's assertion that the discrimination provision only applied to disparate rates for similar service, nor am I convinced that Congress intended to limit discrimination to rates solely. True, a great proportion of the cases have dealt with discriminatory pricing for similar transportation services. That is to be expected since, in the past, the Commission heavily regulated rates in both motor and rail transportation. However, discrimination can also be in the form of inferior service or an abrupt halt in service to certain segments of shippers where no other feasible alternatives to that service exist. Prior to 1980, the Commission awarded licenses to UPS guaranteeing it and other carriers a protected market. In return for that market carriers were to provide equal treatment in terms of price and services to shippers with similar transportation characteristics.

The majority's basis for finding no discrimination here is that UPS filed a tariff to exclude service to all shippers of fireworks in small packages. As I see it, the discriminatory

intent comes when UPS, having used that "protected market" for so many years, refuses to transport those commodities for no legitimate transportation reason to the detriment of those shippers.

On the record presented, I conclude that UPS has not met its burden on reopening to justify a reversal of our previous decision.

COMMISSIONER LAMBOLEY, dissenting:

On reopening, I continue to adhere to the reasoning, discussion, and conclusions announced in our decision served July 12, 1988.[18] None of the evidence adduced by UPS persuasively refutes the conclusions reached by the majority in that decision. UPS purports to provide the same small package service for all customers who comply with its size and weight restrictions, yet it has singled out this one "type of traffic" to exclude from service without reasonable justification in violation of 49 U.S.C. § 10741(b).

Our discussion in *UPS I* decision adapted the four-part rate discrimination test of the *Harborlitecase*[19], to this situation which involved a discriminatory termination of service for "common fireworks" (while all other small package shippers and particularly shippers of other Class C explosives continue to receive service). We determined that the complainants had met the first three elements of the test, showing the service disparity, competitive injury, and common control. The burden then shifted to UPS to show sufficient differences in transportation circumstances to justify the discrimination established by the complainants.

The evidence introduced by UPS on reopening pertains to this disparity in transportation characteristics upon which UPS

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[18] *B.J. Alan Co., et al. v. United Parcel Service, et al.*, 4 I.C.C.2d 704 (1988) (UPS I).

[19] *Harborlite Corp v. Southern Pac. Transp. Co.*, 364 I.C.C. 585 (1981).

relies upon to justify cessation of service (although UPS rejects the application of the adapted rate discrimination analysis to this situation). Since UPS' evidence and argument on reopening merely adds more volume of the same type of evidence we initially considered[20], it suffers from the same ultimate inadequacy for UPS' burden of proof. Although UPS may have demonstrated some inconvenience or additional cost,[21] I am not convinced UPS has supported its burden of proof for cancelling service. This is especially true because UPS has the more versatile and less drastic option of imposing additional service regulations and/or charges tailored to address the specific situation presented by fireworks transportation.

The theoretical underpinnings of the majority views effectively nullify the statutory common carrier obligation and prohibition against discrimination by motor carriers. The majority simply reasons that the "prevailing competitive climate" which presents no inherent barriers for "entry of new carriers into this market" for new service, or expansion of existing service, makes UPS actions lawful. Such conclusionary logic is contrary to law and fact. The 1980 MCA did not alter the common carrier or the antidiscrimination provisions for motor carriers. "New" entry into the LTL market, and specifically the small parcel service category, by motor carriers has been almost non-existent, although exits and consolidations have occurred.[22] In my view, "competition" as claimed on this

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[20] Since the majority agreed to reopen and to request additional evidence, the handling of discovery requests ought to have been assigned to the Office of Hearings or at least ought to have been considered by the entire Commission in the first instance to allow a full development of the record. See my separate expression to the decision served March 3, 1989.

[21] The cost evidence submitted by UPS on reopening does not seem to be very creditably supported. Neither does UPS compare *revenues* from this traffic with the costs, nor compare the similar costs for handling of other Class C traffic and returns.

record in this case does not obliterate common carrier or antidiscrimination provisions of the Act.

For the purposes of this case, UPS holds general, unrestricted all-commodity authority[23] and holds itself out to the public on that basis. Even crediting UPS' desire to target and focus a more narrow service, to the extent that a shipper tenders traffic in a fashion similar to others, it is appropriately entitled to claim service.

Neither the "success" of UPS, nor the "piggyback" notion espoused by the majority are cognizable grounds for denial of relief. Moreover, the remaining arguments of UPS are not any more persuasive now than before.[24]

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[22] Curiously, the majority itself emphasizes that UPS "developed its publicly praised service over time", and that "it was not created overnite".

[23] UPS' general commodities authority is subject to some usual exceptions not relevant here (i.e. items of unusual value, Classes A and B explosives, household goods, etc.), as well as to restrictions regarding the size and weight of packages accepted for shipment.

[24] Operational impracticability and inconveniences associated with Class C status are not sufficient to establish a basis of refusal to serve as claimed by UPS. UPS acknowledges that it provides service to shippers of Class C and other regulated commodities. Likewise, UPS' public image arguments are entitled to little weight. Finally, interstate commerce in which UPS provides the service in question is the subject of regulation by the Federal Government. Prohibitive application of State and local laws alluded to by UPS is largely unexplained relative to Class C and other similar regulated commodity traffic.

Appendix E

INTERSTATE COMMERCE COMMISSION REPORTS

No. MC-C-30093

B.J. ALAN CO., INC., et al.

v.

UNITED PARCEL SERVICE, INC. (an Ohio corporation),
UNITED PARCEL SERVICE, INC.
(a New York Corporation),
and ROADWAY PACKAGE SYSTEM, INC.

Decided July 8, 1988

Challenged tariff provision limiting the service respondents hold out by excluding transportation of common fireworks found to be unreasonably discriminatory. Respondents ordered to restore service.

Kathleen A. Rittner and *Richard H. Streeter* for complainants.

Everett Hutchinson, James F. Moriarty, and *William H. Shawn* for respondents.

DECISION

BY THE COMMISSION:

By complaint filed March 21, 1988 (as amended March 24, 1988), B.J. Alan Co., Inc., Olde Glory Marketing, Limited, Neptune Fireworks Company, Inc. and Nebraska Fireworks, Inc. (collectively, complainants), challenge certain tariff restrictions published by respondents United Parcel Service, Inc. (an Ohio corporation), United Parcel Service, Inc. (a New York Corporation) (collectively, UPS), and Roadway Package System, Inc. (RPS). The challenged tariff restrictions exclude

shipments of common fireworks from the items transported under respondents' small-package freight authority.

Because the transportation of common fireworks is within the scope of respondents' certificates of public convenience and necessity, complainants allege that the tariff restrictions constitute a failure to provide reasonable and adequate service and, thus, violate respondents' common carrier obligation. Complainants also challenge these tariff restrictions as unreasonable discrimination against a particular type of traffic and against complainants, in violation of 49 U.S.C. §10741.

Discovery issues were referred to an Administrative Law Judge (ALJ) for resolution, and the proceeding was scheduled for handling on the basis of written verified statements on an expedited basis. Complainants have filed their statement of facts and argument, respondent UPS submitted its reply, and complainants have filed rebuttal argument.

PRELIMINARY MATTERS

Complainants move to dismiss with prejudice the complaint against RPS. The motion will be granted.

Various other pleadings have been filed relating to discovery. Matters of discovery, as noted, were referred to the ALJ for resolution on an expedited basis, and have been resolved. The ALJ concluded discovery on an expedited schedule and has recommended that complainant Nebraska Fireworks, Inc., be dismissed from the case for failure to comply with discovery. We will so order.

BACKGROUND

On November 24, 1987, UPS filed a supplement to its tariffs, to become effective January 1, 1988, stating that "common fireworks as defined in Department of Transportation Hazardous Materials Regulations, 49 C.F.R. §173.100(r)," would not be accepted for transportation. Complainants

protested this tariff supplement, requesting suspension and investigation of this item. On December 28, 1987, the Commission's Suspension Board declined to suspend or to investigate. On December 31, 1987, the Commission upheld the Suspension Board's decision. Accordingly, the challenged tariff item became effective and UPS is now operating under its provisions.

By a decision served June 27, 1988, the Commission announced its ultimate finding in this case that UPS' refusal to transport common fireworks violated the prohibition of 49 U.S.C. §10741 against unreasonable discrimination. UPS was ordered to reinstate service for common fireworks shipments by June 30, 1988. One June 29, 1988, the Commission voted to stay the effective date of the reinstatement order until July 8, 1988, to allow sufficient time to issue this decision to supply the rationale for the June 27, 1988, decision.

UPS is a nationwide motor carrier system specializing in small-package delivery. UPS' package handling practices are designed to produce uniform transportation conditions for each package. This practice of uniform handling is the basis for a simple and efficient system of low-cost small shipment pickup, line-haul, and delivery throughout the country.

Department of Transportation (DOT) regulations require that common fireworks move in small parcels. UPS solicited this business aggressively, and for many years it has dominated the distribution of common fireworks throughout the United States. Numerous fireworks companies rely exclusively on UPS to distribute their products. They have found that UPS is the only carrier currently available which offers a nationwide network of small package transportation with low rates and reliable service. Indeed, the availability of UPS' service was the critical factor in complainants' establishing the mail-order fireworks business (Verified Statement of Saul Kass). Fireworks shippers have organized their businesses in reliance

on the continued availability of UPS' service (Verified Statement of Jerry Siegel). Some fireworks shippers who planned to sell through catalogues actually closed their doors when UPS discontinued its fireworks service (Verified Statement of Debbie Heim).

Since UPS ceased transporting common fireworks, complainants state that they have yet to find cost-competitive alternatives. Many carriers refuse to carry fireworks at all, and the services of other carriers are assertedly inferior to the former UPS service in terms of price, timely delivery, locations served, qualify of service, and expertise in small package handling. Those few carriers that handle this traffic post significantly higher rates than UPS did, to the point that customers assertedly refuse to purchase fireworks if they must pay a premium for delivery. Complainants argue that one carrier presently handling their traffic, Federal Express, is rapidly approaching the point where it no longer will be able to handle the full volume of fireworks shipments tendered to it. They note that motor carriers of less-then-truckload freight have traditionally charged rates based on 500-pound minima, resulting in minimum transportation charges of between $35 and $50 per parcel, and that some impose local delivery charges of up to $50 in addition. As a consequence of UPS' exit for this market, complainants argue they are experiencing dramatically increased shipping costs with respect to all available alternative transportation modes – costs that sometimes exceed the value of the contents of the shipment – and fireworks manufacturers in general assertedly are experiencing significant losses of business. Complainants predict that this situation will cause some manufacturers to cease operations entirely, and the industry labor force generally will constrict.

In response to these arguments, UPS denies that it is violating its common carrier obligation. It notes that this Commission has never regarded this obligation as absolute and that,

particularly since the enactment of the Motor Carrier Act of 1980 (MCA) (the entire thrust of which involved liberalizing the regulatory environment), the importance of this obligation has decreased in favor of increased natural competition. UPS relies principally on this Commission's consistent findings since the passage of the MCA that a carrier is not obligated to provide a service that is operationally or economically impractical.

To illustrate the impracticality of carrying fireworks, UPS describes the ever-changing and non-uniform patchwork of State and local laws and regulations governing the use and possession of fireworks. The tremendous diversity of these laws and regulations, it argues, has made compliance on a nationwide basis a herculean task.

UPS also states that it has found it operationally impractical to continue to transport fireworks because its transportation services were initially designed to compete with parcel post, and it stressed uniformity and simplicity in rates and operations. UPS' operations are fully standardized and automated. It handles approximately nine million packages daily, and its traffic moves on simplified documents that do not identify commodities. Any commodity that is not consistent with its standard procedures required special handling, which creates operational problems. UPS states that fireworks require special handling for various reasons, principally: (1) fireworks shippers are either unable or unwilling to comply with State and local laws, which results in many shipments being returned undelivered and carrier exposure to legal sanctions; and (2) DOT regulations require the placarding of any vehicle transporting 1,000 pounds or more of fireworks, which obliges it to expend extra time and effort to monitor the weight of such shipments being loaded into any one vehicle, and which sometimes necessitates the shutting down of loading lines so that fireworks shipments can be diverted or held for another truck.

UPS' service to small communities remains intact, but it argues that it is complainants' inability to comply with the local ordinances of these communities that created many of the problems it experienced in transporting fireworks. It also observes that complainants regularly use the services of other carriers and so acknowledge in their catalogues. A study conducted for UPS by R. L. Banks outlined the service alternatives available to complainants, including Federal Express and other motor carriers. *See* Complainants' Exhibit No. 32. Finally, UPS asserts that it has not acted in a discriminatory fashion, inasmuch as it is no longer transporting these commodities for any shipper.

DISCUSSION AND CONCLUSIONS

As noted, UPS offers the same service for all its small shipments. Yet, UPS has singled out for different treatment one type of traffic from all the small shipments it handles. Complainants argue that this action rises to the level of unreasonable discrimination prohibited by 49 U.S.C. §10741(b). That provision prohibits a common carrier from subjecting a person, place, port or *type of traffic* to unreasonable discrimination. Historically, the cases addressing service discrimination have been decided with minimal analysis, relying largely on the well established principle that the common carrier obligation required carriers to serve all within the scope of their holding out evenhandedly. *See, e.g., American Trucking v. A., T. & S. F.R. Co.*, 387 U.S. 397, 406-13 (1967). And because prior to 1980 a carrier's holding out was largely equated with its certificate, little analysis was necessary to determine whether a carrier discriminated through selectivity.

In recent years we have substantially modified our view of the common carrier obligation in light of the competitive climate in which the motor carrier industry now operates. Indeed, at least in the area of entry, we now hold, with judicial approval, that a carrier plainly can limit its holding out to less than the

scope of its certificate for reasons of economic or operational impracticality. *See, e.g.,* Ex Parte No. MC-177 (Sub-No. 3), *Elimination of Certificates as The Measure of "Holding Out," 48 Fed. Reg. 11136 (1983).* In our view, the rather rigid analysis under which the old service discrimination cases were decided may not be particularly apt given the dynamics of today's transportation industry.

Therefore, before explaining the "test" that we will use to assess discrimination here, we want to emphasize that this case is very different from the long line of recent licensing cases in which we have confirmed the limited common carrier obligation associated with broad grants of authority. Those cases involved services in areas as to which entry barriers (both licensing and operational) were low, competition was intense, and required strict adherence to the full scope of a license simply made no sense and in fact would have *reduced* the level of service available to shippers. This case, by contrast, involves an area in which entry barriers (at least from an operational and financial standpoint) are high, competition is virtually nil,[1] and, accordingly, shippers will suffer if the carrier can freely decide to abandon an entire segment of the market with no constraints at all. UPS' holding out – not just through its license but through its actions over the past 20 years – encompasses the entire small package market. With this focus, over the years, UPS has built its dominance over the small package market to such an extent that for many shippers it is the only feasible carrier. Indeed, in this case the shippers have shown that they built up their businesses in reliance on UPS' service and that absent UPS' continued service, their businesses may likely fail. Under those circumstances, UPS, in our view, should be required to justify its actions and it is this burden we will here examine. In the usual case, to determine whether complainants have proven a

[1] UPS' domination of the small package market is well known, and is confirmed by the shippers' evidence in this case of their inability to obtain alternative service.

violation of §10741(b) we apply a four-part test. *See, e.g., Harborlite Corp v. Southern Pac. Transp. Co.*, 364 I.C.C. 585, 586 (1981) (*Harborlite*). The four elements of the test have previously been stated as being: (1) a disparity of rates; (2) actual or potential competitive injury to the complaining party; (3) control of both the lower and higher rates; and (4) an absence of differences in transportation conditions that would justify the rate disparity.

Harborlite and other recent cases applying our discrimination analysis involved only *rate* disparities. Elements one, three, and four as set forth in those cases simply reflect this fact. This case, of course, is not on its face a rate discrimination case, but the analysis in those cases regarding rate disparity can be used here, with some minor modifications, to assess service disparity questions, and we will proceed accordingly. Under step one, complainants must show the service disparity, competitive injury, and common control. Next, the burden shifts to defendant to show sufficient differences in transportation conditions to justify any discrimination established by complainants.

Our basis for finding that element one of the discrimination test has been met stems from UPS' own characterization of its service. That is, it provides the same service to all shippers and all shipments, regardless of content. Indeed, in supporting its action here it confirms its commitment to that type of uniform operation. UPS has not cancelled service for any of its other small shipments customers including other shippers of Class C explosives, such as firearms. Therefore, we believe that UPS has subjected complainants' "type of traffic" to a service disparity when compared to the traffic of UPS' other customers.

Complainants have produced voluminous evidence cataloging the huge disparity between rates charged by UPS for small packages of fireworks and the rates listed by others for carrying these commodities. For example, Eagle Fireworks,

Inc. was accustomed to paying $5.50 to ship a 10 pound parcel of fireworks via UPS. The average cost for using a regulated LTL trucking service would be $42.00. Federal Express offered service to Eagle for $9.00.

Faced with shipping costs at this level, Eagle anticipated losing all of its mail-order fireworks business. Every one of the two dozen fireworks companies filing statements in support of the complaint outlined in detail the enormous disparity in rates between UPS and other companies.

Complaints have effectively demonstrated that they were competitively injured by the disparity. Acme Fireworks testified that many of their previous customers have not reordered because higher transportation costs made their products unattractive. Acme anticipated losing all of its mail-order business. B.J. Alan anticipated losing 60% of its mail-order sales and 40% of its wholesale business. In addition, B.J. Alan described substantial expenditures for custom computer systems, loading facilities, and other capital items in anticipation of having UPS available to service its shipping needs.

In short, UPS stands alone among small shipments carriers with a nationwide network offering low rates. Federal Express lacks both the service capacity and an appropriate rate structure to meet the needs formerly filled by UPS. Other small shipments carriers lack the geographic scope and reliability offered by UPS. LTL trucking companies offered the least attractive alternative because of high prices based on high minimum weights. To use LTL truckers, complainants would be forced to aggregate their shipments and thereby lose the flexibility to dispatch small parcels to retail outlets or mail-order customers. Thus, it is clear that UPS service is unique.

Complainants have established that their companies will lose sales, close or severely trim mail-order operations, and forego anticipated growth opportunities without service from

UPS. Many fireworks companies will be limited to local markets without UPS' nationwide shipping services.

The third part of complainants' burden of proof is establishing common control. As explained in *Harborlite* there are various ways of viewing this requirement. The strictest approach calls for the carrier to have actual control of and responsibility for the level of both the higher and lower rates. That approach would be inappropriate here because UPS is not actually charging two different levels of rates. Instead, it is withdrawing rates on one type of traffic from the marketplace. As discussed above, our analysis on this element again is premised on UPS' basic structure. It provides one service—small package delivery—and, until now, treated all shippers of all types of traffic alike. Thus, as to element three, it commonly controls service to all its small package shippers but has chosen to single out fireworks traffic from the traffic of all its other shippers and to discriminate against that traffic.

Because complainants have established that UPS is the controlling source of a service disparity which results in competitive injury to fireworks shippers vis-a-vis UPS' other shippers, what remains is an examination of UPS' justification for this discrimination based on differences in transportation conditions. UPS has presented a number of arguments to try to establish that carriage of common fireworks is sufficiently different and difficult to warrant eliminating this service. Our review of UPS' evidence leads us to conclude that UPS faces some inconvenience in transporting common fireworks but has not justified cancelling service based on differences in transportation conditions.

High on UPS' list of transportation differences is the existence of non-uniform State and municipal regulations governing fireworks. While none of these laws regulates fireworks transportation *per se*, UPS does often find itself in the middle of misunderstandings and disputes between fireworks

shippers and State and local officials enforcing laws governing the use of possession of common fireworks. UPS describes the adverse publicity and legal actions which can accompany mishaps with fireworks. It also claims chronic difficulties caused by complainants' failure to observe State and local laws.

Complainants hotly dispute UPS' characterization of the level of disruption caused by the necessity of complying with State and local laws. In complainants' view, mutual efforts to solve whatever problems exist is a practical solution to UPS' perceived compliance difficulties. By complainants' count, compliance problems resulting in shipment returns played a role in fewer than 4% of B.J. Alan's shipments (Complainants' Exhibit 44). Complainants also recounted an episode involving 400 returned shipments, half which were erroneously rejected by UPS. In view of the volume handled by UPS on an average day (nine million packages) the number of problems has not been shown to be different from those associated with other areas of UPS' small shipments business, nor can they be construed as onerous in relation to UPS' volume of 200 million packages a month. Nor has UPS shown why other efforts short of service cancellation would not be sufficient to minimize or eliminate existing compliance problems. For example, UPS has not sought to amend its tariffs selectively to cut off service not only to areas in which there are serious difficulties with State and local laws. Nor has it attempted any other potentially successful means of addressing what is really a local law enforcement issue, such as requiring a shipper certification on the bill of lading indicating that the shipment is not destined to an area in which fireworks are prohibited.

UPS also tried to demonstrate that fireworks transportation interferes unduly with the conduct of its ordinary business. The main example it used was the Federal requirement to placard any vehicle carrying more than 1,000 pounds of Class C explosives, 49 C.F.R. §172.504. In an effort to avoid the placard-

ing requirement, UPS would carefully monitor the weight of fireworks loaded onto each truck. This activity caused significant slow-downs in a system which otherwise treats small packages in a uniform manner.

While it is undoubtedly true that the placarding requirement imposes some cost and inconvenience to UPS' overall operations, we believe that UPS' case is overstated. Given UPS' own arguments about seasonality of fireworks traffic, placarding and monitoring, standing alone, represent minor inconveniences that can be addressed through the rate structure. And even to the extent that there is a year-round fireworks market, no adequate explanation is offered for why placarding and monitoring are such onerous or undesirable obligations as to justify terminating common fireworks service.

UPS' final effort to distinguish fireworks from its other small shipments traffic is the actual and potential injury to its business and reputation posed by continuing to transport fireworks. These injuries are said to result from potential liability from handling these goods and the necessity for placarding trucks with signs reading "Dangerous." UPS' fears and concerns in this area seem particularly unwarranted.

Complainants have established through competent evidence that common fireworks packaged according to Federal safety standards involve little or no inherent risk (Verified Statement of John A. Conkling). Thus, safety issues are not a real factor in this case. Rather, it is a generalized fear on the part of UPS that its image is tarnished each time a package it delivers allegedly causes injury, or a small number of its trucks are occasionally placarded. While these concerns are legitimate they must be weighed against the proven harm which service cancellation inflicts on complainants. Moveover, complainants have in our view demonstrated that the so-called threat of lawsuits is largely hypothetical. And given UPS' well recognized status as the Nation's premier small package carrier, it

does not appear to us that the mere act of displaying a placard on a few of its trucks will sufficiently tarnish UPS' image as to result in any lost business. If UPS remains as efficient and economical as it currently is, an occasional placard should not lose it a shred of traffic.

In summary, complainants have established the three elements of unreasonable discrimination and UPS has not justified the discrimination by showing different transportation conditions support discriminatory treatment. UPS has chosen not to transport fireworks on the basis of inconvenience rather than the compelling necessity which the law accepts as adequate justification for different treatment.

Accordingly, we find that UPS' refusal to transport common fireworks is unlawful.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

COMMISSIONER SIMMONS, concurring:

While I agree that UPS' refusal to transport common fireworks was unreasonable discrimination and therefore, unlawful under §10741, I take the position that the case should have been decided primarily on the issue of whether UPS has violated its common carrier obligation. I believe by its actions that UPS has indeed violated its common carrier obligation. The fundamentals of the common carrier obligation, as described by numerous cases, are that a carrier who holds itself out to provide transportation must serve all, up to the capacity of his facilities without discrimination and for reasonable rates. Nevertheless, in the vast majority of cases, we would rely on the forces of competition to promote the common carrier obligation. When other carriers exist willing to provide reliable service, the principles of the common carrier obligation are fulfilled. The Motor Carrier Act of 1980 provided for eased entry as a source for

increased competitive alternatives within the motor carrier industry. Increased competition has enhanced the common carrier obligation as trucking firms expanded their operations and geographic scope in order to meet the distinct needs of a variety of shippers. However, because UPS' unique service has not faced serious competitors for nationwide small package shipments, competition cannot be a substitute here for the common carriage obligation. That Act did not repeal the common carrier obligation. Congress' desire to preserve the law in this area can be seen by the fact that it retained the statutory duty that common carriers file tariffs with this Commission. The very existence of tariffs on file is an integral part of this obligation and indicates that a carrier intends to and is capable of providing the services described in the tariff. Carriers are thus bound to abide by the terms of their tariffs and not discriminate.

In the most recent judicial review of the common carrier obligation, the Fifth Circuit in *Steere Tank Lines v. I.C.C.*, 675 F.2d 103, 105 (1982) did not relieve carriers entirely of this judicial and statutory responsibility. It simply reaffirmed the existing legal doctrine that the carrier must provide transportation services upon demand up to its capabilities. UPS maintains that the *Steere* court holding removes any adherence by a carrier to the common carrier obligation. This is not an accurate reading of that decision. The issue there dealt with eased entry and whether a carrier was obligated to provide services beyond the extent of its capabilities at the time it receives an ICC certificate. The *Steere* court held that the Commission could, under the principles of eased entry and increased competition, grant a certificate broader than the service which the applicant was then physically capable of handling. It did not abolish the common carrier obligation. The court relied on case law to explain:

> A common carrier is free to carve out as large or as small a niche as it feels appropriate. *Pennsylvania*

> *Railroad v. Puritan Coal Mining Co.*, 237 U.S. 121, 133, 35 S.Ct. 484, 488, 59 L. Ed. 867 (1921). Its duty is only to "serve all, up to the *capacity of its facilities* without discrimination and for reasonable pay." *Michigan P.U.C. v. Duke*, 266 U.S. 570, 577, 45 S.Ct. 191, 193, 69 L. Ed. 445 (1925). While the provisions of the Motor Carrier Act may well require that no material type of the transportation authorized by the certificate be beyond the carrier's fitness, willingness, and ability, there is no requirement that the carrier be able, quantitatively, to perform all or any substantial part of the transportation in all covered areas.

Id at 105.

In other words, *Steere* stands for the proposition that a common carrier need not be *able* to serve to the extent of its authority, but it has a duty to reasonably serve all to the extent it is able. Along those same lines the Commission stated in Ex Parte MC-77 (Sub-No. 3) *Elimination of Certificates as the Measure of Holding Out*," 48 Fed. Reg. 11136 (1983), that on determining the scope of the common carrier obligation, we must consider whether the service is "economically or operationally impracticable." 48 Fed. Reg at 11,137 (1983). The Commission relied on *Steere* when it stated "that a carrier has the obligation to serve up to its capabilities and will not be deemed to violate its common carrier obligation if it does so nondiscriminatorily." 48 Fed. Reg. at 11,136 (1983). Nowhere in that decision did we insist that because of the 1980 Motor Carrier Act, the doctrine of common carrier obligation was no longer necessary.

Since no legal basis exists to hold that the common carriage obligation has been abolished, the Commission should have then addressed the question of whether requiring UPS to transport fireworks is beyond the capacity of its facilities, or operationally or economically impracticable.

I would first point out that the evidence of record reveals that UPS certainly has the capabilities to provide this service. For years it harvested the small package fireworks traffic, aggressively tailoring its services to the distinct needs of those shippers. Its vast facilities are unmatched by any other operator in the field. UPS has not demonstrated that the financial returns from transporting fireworks are inadequate. Additionally, the carrier can cite no judgments or pending civil lawsuits against it as a result of transporting fireworks consistent with federal safety standards.

Further, I am not persuaded by UPS arguments that the "ever changing and non-uniform patchwork of state and local regulations" regarding use and sale of fireworks is causing such severe problems as to make the shipment of fireworks operationally and economically impracticable. DOT has sole jurisdiction over the interstate transportation of fireworks. As long as UPS and the shipper comply fully with federal regulations in the transportation aspect, such transportation services are protected by federal law, and a carrier cannot rely on such local laws to relieve it of its common carrier obligations. See *Louisville & Nashville R.R. v. F.W. Cook Brewing Co.*, 223 U.S. 70 (1912); *Trainload Rates on Radioactive Materials, Eastern Rys.* 362 I.C.C. 756 (1980) *aff'd sub nom., Consolidated Rail Corp. v. ICC*, 646 F.2d 642 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1097 (1981). Were it otherwise, a significant number of so-called undesirable commodities (i.e., hazardous materials, nuclear waste) could never cross state lines.

In the final analysis, shippers of fireworks in small packages have, as yet, no reasonable alternative to UPS' nationwide service for small parcel deliveries. As I have stated, it is the absence of these alternatives which compel me to invoke the common carrier doctrine. The lack of alternatives was highlighted in the record where internal studies conducted by UPS employees in February 1987 concluded that alternative service

is not available for small parcel shipments. One in-house memo introduced into evidence entitled "Fireworks Shippers in the Dakotas" noted that "[w]hile all three of these accounts utilize various LTL carriers for their heavier shipments, there appears to be no cost effective alternative to using UPS. Parcel Post will not handle these shipments and in the Dakotas there is not a nationwide small parcel carrier for them to use as an alternative means of shipping." Another in-house memorandum in the record flatly rules out use of other large LTL carriers such as Consolidated Freightways and Yellow Freight for small parcel service similar to that offered by UPS.

The dissenting opinion implies that because of the result reached by the majority, a carrier could be forced to provide service to a group of shippers indefinitely. Enforcement of the common carrier obligation would require no such absolutes. Under the unique circumstances of this case, if the only carrier capable of providing the transportation service refuses to provide those services for no economical, or operational reasons, then these shippers will not share the benefits of reliable, efficient service promised in the Motor Carrier Act of 1980. Retention of the common carrier obligation here simply recognized the reality that the marketplace cannot provide the solution in every instance. Such realization is the essence of government regulation.

CHAIRMAN GRADISON, dissenting:

The majority is simply mistaken in its professed belief that this is a case involving unreasonable discrimination proscribed by 49 U.S.C. §10741. First, there are not any preferred shippers or types of traffic to be found here to which the shippers of fireworks can point as causing them to be placed in a position of competitive disadvantage. Second, whatever sort of economic injury the shippers (or receivers) of fireworks have suffered as a result of UPS exiting this market, it cannot be

characterized as the sort of "competitive harm" which the statute is designed to allay.

Every decision of every participant in the marketplace to buy or not to buy, to sell or not to sell, to raise or lower a bidding or asking price, to enter or exit a market, to offer to extend or the decision to withhold one's capital or labor, "harms" somebody else whose prior market decisions failed to correctly anticipate and take into account the unknown future market decisions of others. The fact that the mistaken expectations of some about the future actions of others results in economic "injury" (i.e., disappointment and lost profits) is a necessary feature of a market which rewards those who best anticipate the unfolding of the market process. To describe such normal, pervasive, and quite desirable consequences as somehow being harmful to competition or as constituting competitive harm is nonsense precisely because these consequences are the essence of the competitive order, and markets simply would not be markets if the coordinating function of such outcomes were forbidden.

Today's case stands for the proposition that, if a situation exists where a common carrier has built up a successful service upon which others have for their own economic motives chosen to rely, then 49 U.S.C. §10741(b) operates to create a legally cognizable right of the persons who have placed themselves in such a position of reliance to force the carrier to continue to serve their ends in perpetuity unless the carrier can persuade a majority of the Commission that it has a "good excuse" to redeploy its assets for other purposes. Whatever one chooses to call such a legal theory, it has nothing to do with the traditional notions of unreasonable discrimination or competitive harm.

VICE CHAIRMAN ANDRE, dissenting:

Even though the transportation of fireworks is both operationally and economically not feasible; even though the United States Postal Service is by law not allowed to transport fireworks

because of the same legal and economic considerations cited by UPS; and even though the Interstate Commerce Commission seven months earlier allowed UPS to stop transporting fireworks, UPS is now being ordered to transport fireworks nonetheless. It is unfortunate that what should essentially be a business decision by a carrier to decide what products it will and will not transport cannot now be made without the permission of a five member Commission.

The position that a common carrier unreasonably discriminates because it has decided not to transport a certain type of traffic, fireworks, while it will transport different types of traffic similar size, personal packages, is simply untenable. While 49 U.S.C. §10741(b) does prohibit a carrier from subjecting a person or type of traffic to unreasonable discrimination, in *Brown Transport Corp. v. McLean Trucking Company*, 367 I.C.C. 943 (1984), the Commission recognized the principle that to support a finding of unreasonable discrimination under that section, a showing must be made that shippers are charged different *rates* for *like* transportation of *like* products. Even *Harborlite Corp. v. Southern Pac. Transp. Co.*, 364 I.C.C. 585 (1981), cited by the majority as legal precedent for this case, sets out part one of the four part test as requiring proof of a disparity of *rates*. The majority goes even further and admits that *Harborlite* and other recent cases applying discrimination analysis involve only *rate* disparities the law is clear: the wrong prohibited by that Section is unreasonable *rate* discrimination between shippers of a *like* product from similar localities to similar destinations.[2]

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[2] See also: Harborlite, supra, at 586 (the unreasonable discrimination prohibition * * * "strikes a balance between two ideals—equality of freight rates for similarly situated shippers, and freedom of carriers to price each service independently.") and H. Samuels Co. Inc., v. Atchison, T. & S.F. Ry. Co. 364 I.C.C. 280, 281-282, (1980) ("A disparity of rates is the point of beginning.") In fact, the history of the statute can be traced to the creation of the Interstate Commerce Commission itself. One of the first discrimina-

Under the correct legal standard, the complainants have failed to show unreasonable discrimination. The statute was never designed to prohibit disparate treatment of different products, but was rather created to prohibit disparate treatment of like products shipped from similar locales, i.e., charging a different rate for corn shipper A than the rate charged to corn shipper B even though both shippers ship from similar locales to similar destinations. The UPS proposal is an entirely different situation. This is not a case of two like shippers of common fireworks shipping fireworks from a similar origin point to a similar destination yet being charged two different and wholly indistinguishable rates. Rather, in this case, there are no shippers of common fireworks who are being treated differently for like transportation of like products. The UPS decision applies equally across-the-board, to all shippers of all common fireworks.

Since the majority, under the traditional legal standard, could not reach the conclusion that UPS' decision constituted unreasonable discrimination, the majority, by combining the elements of the traditional standards of the common carrier obligation test with the elements of the traditional test used to find unreasonable discrimination, simply changed the legal standard which would normally be applied under 49 U.S.C. 10741(b). Therefore, despite the historical and congressional intent of the statute to apply only to rate discrimination, the majority, without explanation and completely arbitrarily, simply replaces the work "rate" with "service" in part one of the test, and in part three of the test, the majority changes the requirement that the carrier have actual control of and responsibility for both

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tion cases was Texas & Pacific Railway Co. v. I.C.C., 162 U.S. 197 (1896) where the court focused on alleged rate discrimination involved in the transportation of a like product between similar localities to similar destinations.

the higher and lower rate to a more expansive requirement that the carrier merely transports similar types of traffic.[3]

This approach not only changes the meaning of the statute, but it embarks the Commission on an uncharted course; a judicially created new theory of discrimination called "service discrimination." Nowhere in the approximate one hundred and one year history of the Interstate Commerce Act has the Commission adopted such a theory. The approach taken by the majority is more reminiscent of Star Trek space mission—exploring new worlds and going where no man has done before—than a well-reasoned legal decision based upon policy and precedent. Now, with the four part "rate" analysis test modified to a new legal standard of "service discrimination," the majority applies the test to the UPS case, and not surprisingly, reaches the conclusion that UPS is in violation of the statute.

It is impossible to determine the consequences of such a theory, but as with any new judicially created theory, it will certainly lead to further confusion, more litigation, and further changes. Whatever the consequences such a theory may have, one fact is certain, the majority decision has nothing to do with the original intent of the unreasonable discrimination prohibition contained in 49 U.S.C. §10741(b).

Furthermore, for the reasons stated in my dissent in the decision issued on June 27, 1988, I cannot agree that UPS is violating its common carrier obligation. A common carrier is not obligated to provide service which is economically or operationally impracticable, and UPS has sufficiently demonstrated

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[3] While the majority cites Harborlite as adopting this approach, a closer reading of the case reaches precisely the opposite conclusion. The Commission stated that "To the extent that previous Commission decisions do favor an expansive interpretation (of the common control requirement) we regard them as being unsuited to the present regulatory environment, and we will no longer follow them * * * we will recognize common control only where a carrier is, in fact, responsible for a rate disparity." Harborlite, supra, at 595.

that the transportation of fireworks is simply not practicable within its current and future market situation.

Fireworks are operationally, economically, and legally different than other small packages. By specifically prohibiting the United States Postal Service from shipping fireworks but requiring the Postal Service to transport small packages, Congress inherently recognized this distinction. I am hard pressed to understand how the majority can now force a private carrier to transport the same products, regardless of the difficulties in involved, which the United States Postal Service is not even allowed by law to transport because of the same consideration cited by UPS.

Today's decision is a significant departure from the traditional standards used to determine unreasonable discrimination or a violation of the common carrier obligation. Since the majority, under traditional analysis, could not find a violation of the common carrier obligation or of the prohibition against unreasonably discrimination, they simply combined the two legal theories and invented a new theory, service discrimination. I am unwilling to empower this Commission to create a new legal theory which is not supported by the original intent of the statute involved or past Commission precedent. Thus, since UPS is not in violation of its common carrier obligation and does not unreasonably discriminate between like shippers of like products, I cannot agree with the approach taken by the majority. I dissent.

It is ordered:

1. The complaint, with respect to respondent Roadway Package System, Inc., is dismissed with prejudice.

2. Complainant Nebraska Fireworks, Inc., is dismissed as a party to the complaint.

3. By August 1, 1988 (30 days from the service date of our June 29, 1988, decision in this proceeding), UPS must file tariffs

on one day's notice reinstating service on common fireworks on the same terms and conditions which existed prior to their cancellation.

4. This decision is effective on July 14, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Simmons concurred with a separate expression. Chairman Gradison and Vice Chairman Andre dissented with separate expressions.

Appendix F

INTERSTATE COMMERCE COMMISSION

DECISION

No. 40233

EASTMAN KODAK COMPANY –
PETITION FOR DECLARATORY
ORDER – CERTAIN RATES AND PRACTICES OF
ADVANCE UNITED EXPRESSWAYS, INC.

Decided: July 8, 1991

By petition filed May 30, 1989, Eastman Kodak Company (Kodak) sought a determination that it would be an unreasonable practice in violation of 49 U.S.C. 10701(a) to allow Advance United Expressways, Inc. (AUE), a former motor carrier that has undergone reorganization under the bankruptcy laws, and Carrier Service, Inc. (CSI), AUE's collection agent, to collect rates higher than those quoted to and collected from Kodak for shipments of photographic products.[1] The shipments were transported by AUE and moved from Kodak's regional distribution center (RDC) at Dallas, TX, to points in Oklahoma, Kansas, and Missouri in 1985, 1986, and 1987. Kodak now requests that the Commission reopen this proceeding for a determination of rate reasonableness.

PROCEDURAL BACKGROUND

The petition for declaratory order was filed without a court referral and was originally accepted and processed under the Commission's "negotiated rates" policy announced in *NITL – Pet. to Inst. Rule on Negotiated Motor Car.*, 3 I.C.C.2d 99

[1] AUE's reorganization plan was approved by the court on June 10, 1988. *Advance-United Expressways, Inc.*, BKY 3-87-2869 (Bankr. D. Minn. August 14, 1989). AUE and CSI will be referred to collectively as respondents.

(1986) and 5 I.C.C.2d 623 (1989), (*Negotiated Rates*). A decision applying *Negotiated Rates* to the facts presented in this proceeding was served February 26, 1990. While that decision relied in part on the policy statement, it also considered certain issues of tariff applicability and interpretation. The 1990 decision found that the attempted collection of undercharges by respondents constituted an unreasonable practice under the *Negotiated Rates* policy and that Kodak adequately complied with a tariff requirement of filing of a letter of participation.

Subsequently, the *Negotiated Rates* policy was invalidated in *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990) (*Maislin*). In *Maislin*, the Supreme Court held that the commission's *Negotiated Rates* policy is inconsistent with the Interstate Commerce Act.[2] The Court held that the *Negotiated Rates* policy is "contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular." 110 S.Ct. at 2768. The Court did recognize that "[t]he filed rate doctrine, however, contains an important caveat: the filed rate is not enforceable if the ICC finds the rate to be unreasonable." In doing so it cited *Louisville & Nashville Railroad v. Maxwell*, 237 U.S. 94, 97 (1915), for the proposition that the filed rate applies "*unless it is found by the Commission to be unreasonable.*" *Maislin*, 110 S.Ct at 2767 (emphasis added in *Maislin*).

The Court also noted that while the filed rate was the "legal rate," it might not be a lawful rate, which must be reasonable. It pointed out that "the Commission did not find that the rates were unreasonable but rather concluded that the carrier had engaged in an unreasonable practice in violation of §10701 that should preclude it from collecting the filed rates." Id. at 2767. The Court's footnote 10 stated:

[2] *Maislin* does not bar processing cases filed under that policy that involve other issues such as tariff interpretation and application of a different filed tariff. *See* No. 40306, *L. B. Foster Company – Petition for Declaratory Order – Certain Rates and Practices of C&H Nationwide, Inc., d/b/a C&H Transportation Company* (not printed), served September 6, 1990.

> 10The ICC did not determine whether the tariff rates were unreasonable even thought respondent requested such a determination. We therefore must assume, for purposes of our decision today, that the rates were reasonable. The issue of the reasonableness of the tariff rates is open for exploration on remand.

The Court reversed and remanded for further proceedings. On remand, the district court has referred the *Maislin* proceeding to the Commission for consideration of issues of tariff applicability and rate reasonableness.[3]

Kodak filed a petition to reopen this proceeding on August 27, 1990, and respondents replied. Kodak seeks to have the proceeding reopened to take additional evidence and to make findings with respect to the reasonableness of rates sought to be imposed by respondents. Kodak notes that its original petition raised issues as to the reasonableness of the filed tariff rates sought to be imposed by respondents, but that because the *Negotiated Rates* policy was in place (and had received the support of the Eighth Circuit Court of Appeals in the *Maislin* proceeding) during the period of time for filing evidentiary statements, it did not present evidence as to the reasonableness of the rates sought to be imposed.[4] The federal district court proceeding[5] initiated by AUE against Kodak was still pending

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[3] No. MC-C-10961, *Primary Steel, Inc. v. Maislin Industries, U.S., Inc., et al.* (not printed), served February 1, 1991, established a procedural schedule for the submission of evidence.

[4] We also note that because of the existence of the *Negotiated Rates* policy, the Commission would not have determined rate reasonableness regardless of the evidence in the record.

[5] The court action, docketed under No. CA-3-89-2025-G in the United States District Court for the Northern District of Texas, Dallas Division, was begun on August 9, 1989. The court granted the carrier interests' motion for summary judgment, and Kodak has appealed (*Advance-United Expressways, Inc. v. Eastman Kodak Company*, U.S.C.A. 5th Cir., No. 91-1320).

when the petition to reopen was filed. Respondents contend on reply that Kodak has failed to establish material error, new evidence, or substantially changed circumstances to warrant reopening this proceeding.

We conclude that the Supreme Court's action in *Maislin* constitutes sufficient changed circumstances and imbues our prior decision with material error such as to warrant reopening this proceeding. 49 U.S.C. 10322(g)(1). We will reopen the proceeding for submission of additional evidence and argument, and for reconsideration of the 1990 decision in light of *Maislin*.

Respondents also challenge the Commission's jurisdiction, in the absence of a court referral, to further consider this case. The challenge is misapplied. This proceeding raises an issue that the Supreme Court has determined is within this Commission's primary jurisdiction, that is, the reasonableness of filed rates. *United States v. Western Pac. R.R.*, 352 U.S. 59, 62-70 (1956) (*Western*).[6] Whether or not the matter still is pending in court, we have broad authority to "issue a declaratory order to terminate a controversy or remove uncertainty" under section 554(e) of the Administrative Procedure Act. Here we have uncertainty or controversy concerning the lawfulness and applicability of the filed rates relied upon the respondents in asserting the undercharge claims. It is implicit in the *Maislin* remand that the Court considered the unreasonableness of the filed rates to be available as a defense in an undercharge action,[7] and the Court has indicated otherwise that such a defense is available. *See Western*, 352 U.S. at 74.

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[6] *Western* is a 1956 rail case; because of the 1965 legislation granting the Commission authority to determine motor carrier rate reasonableness, the primary jurisdiction principle enunciated in *Western* is now equally valid for motor carrier cases. See *Informal Procedures for Determining Reparations*, 335 I.C.C. 403, 408 (1969).

[7] See also *Delta Traffic Service, Inc. v. Transtop, Inc.*, 902 F.2d 101, 104-107 (1st Cir. 1990).

Appendix G

INTERSTATE COMMERCE COMMISSION

DECISION

No. 40398

GENERAL BINDING CORPORATION – PETITION FOR DECLARATORY ORDER – CERTAIN RATES AND PRACTICES OF ADVANCE-UNITED EXPRESSWAYS, INC.

Decided: July 12, 1991

This matter is before the Commission on referral from the United States District Court for the Northern District of Illinois, Eastern Division, in Case No. 89 C 7073, *Advance-United Expressways, Inc. v. General Binding Corporation* (referral order dated January 23, 1990), and involves several issues including rate reasonableness and tariff applicability arising from undercharge claims by the respondent Advance-United Expressways, Inc. (AUE), a former motor carrier that has undergone reorganization under the bankruptcy laws,[1] and Carrier Service, Inc. (CSI), AUE's collection agent, against petitioner General Binding Corporation.[2]

By decision served February 22, 1990, a procedural schedule was established to allow parties to file their written verified statements. This decision indicated that the matter

[1] AUE's reorganization plan was approved by the court on June 10, 1988. *Advance-United Expressways, Inc.*, BKY 3-87-2869 (Bankr. D. Minn. August 14, 1989). AUE and CSI will be referred to collectively as respondents.

[2] The court ordered "that the question of the reasonableness of the transportation charges claimed due . . . and the question of the reasonableness of practices and procedures engaged in by [AUE] are referred to the Interstate Commerce Commission for determination. . . ."

involved application of the Commission's policy statement concerning negotiated motor common carrier rates. *See NITL – Pet. to Inst. Rule on Negotiated Motor Car. Rates*, 3 I.C.C.2d 99 (1986), and 5 I.C.C.2d 623 (1989). Petitioner and respondents thereafter filed verified statements and argument in support of their respective positions and the record closed. At the same time the record was closing, the Supreme Court invalidated the *Negotiated Rates* policy in *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990) (*Maislin*).

General Binding filed a petition to reopen this proceeding on August 30, 1990, and respondents replied. General Binding seeks to have the proceeding reopened to take additional evidence and to make findings with respect to the reasonableness of rates sought to be imposed by respondents, as well as the issue of the applicability of the tariff relied upon by respondents. While the referral included the issue of rate reasonableness, General Binding indicates that because the *Negotiated Rates* policy was in place (and had received the support of at least four courts of appeals) during the period of time for filing evidentiary statements, it did not present evidence as to the reasonableness of the rates sought to be imposed.[3] Respondents contend on reply that General Binding has failed to establish sufficient grounds to warrant reopening this proceeding.

The Commission has just concluded, in another proceeding involving respondents, that the Supreme Court's action in *Maislin* constitutes sufficient changed circumstances to warrant reopening a proceeding after a decision under the *Negotiated Rates* policy. *See Eastman Kodak Company – Petition for Declaratory Order – Certain Rates and Practices of Advance United Expressways, Inc.* (not printed), served July 12, 1991. This proceeding will be reopened also for submission of addi-

[3] It also notes the Commission has previously determined that a general allegation of unreasonableness is sufficient to permit the consideration of an allegation of inapplicability.

tional evidence and argument on the issues of rate reasonableness and tariff applicability. A procedural schedule providing for the filing of additional evidence and argument will be established to supplement and clarify the record. To the extent the parties rely on the existing record, they should identify and/or furnish copies of relevant portions.

The reopened proceeding will be handled on the basis of written verified statements. The procedural schedule established is sufficient for the parties to use the Commission's discovery rules (49 CFR Part 1114, Subpart B).

It is ordered:

1. The proceeding is reopened for the submission of additional evidence.

2. Petitioner's statements must be filed by September 30, 1991.

3. Respondent's reply must be filed by October 30, 1991.

4. Petitioner's rebuttal must be filed by November 19, 1991.

By the Commission, Sidney L. Strickland, Jr., Secretary.

Sidney L. Strickland, Jr.
Secretary

(SEAL)